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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 784

CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE
OF WILLIAM L. DEVER, DECEASED,

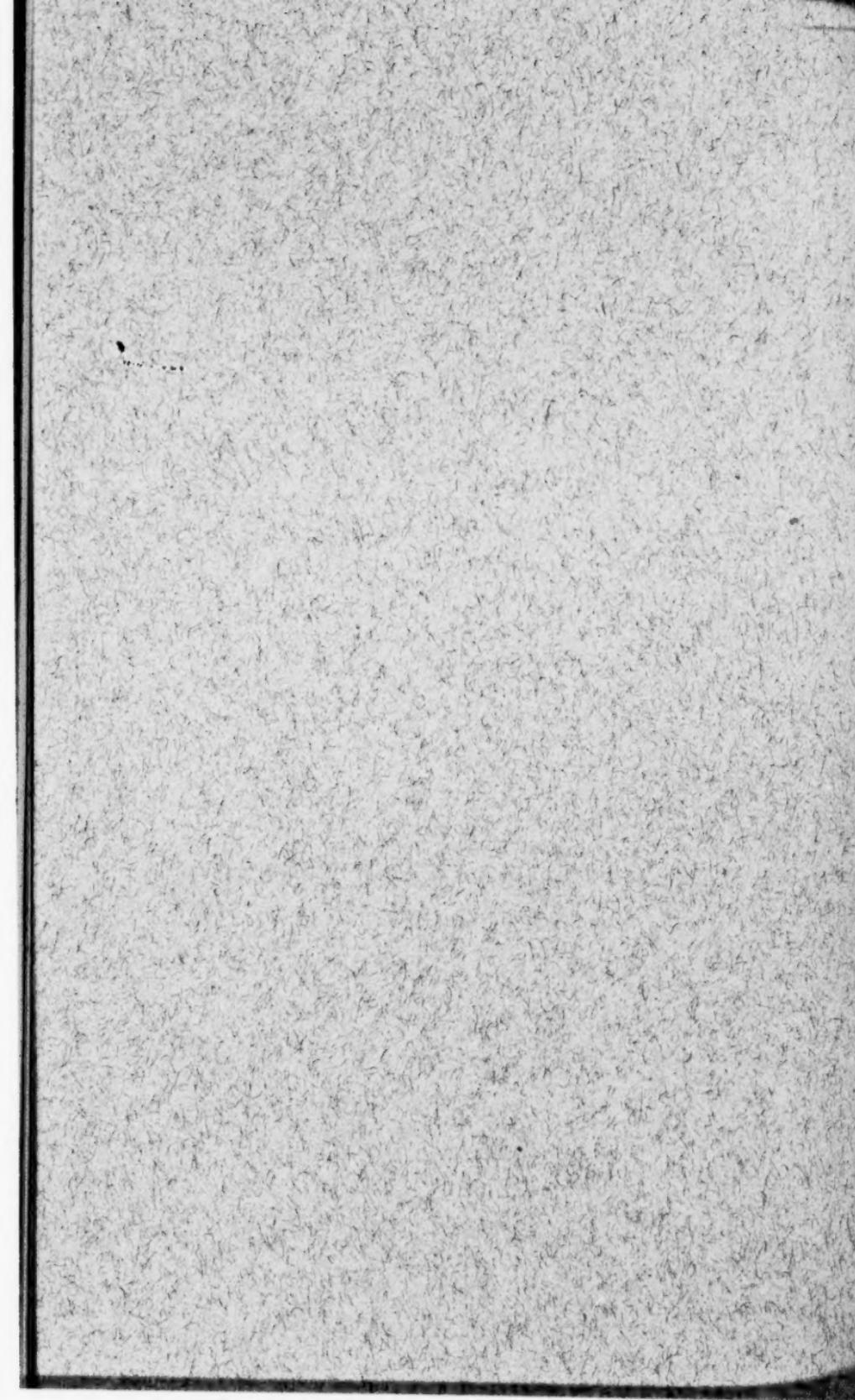
Petitioner,

v.s.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI
AND BRIEF IN SUPPORT THEREOF.**

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CLARENCE C. CHILCOTT,
Counsel for Petitioner.



INDEX

SUBJECT INDEX

Petition for writ of certiorari.....	1
Summary of statement.....	2
Basis of jurisdiction.....	3
Questions presented.....	5
Reasons for the writ.....	6
Prayer.....	12
Brief in support of petition for writ of certiorari.....	13
Opinion of the court.....	13
Statement as to Jurisdiction.....	14
Substantiality of the questions involved.....	14
Statement of the case.....	14
Assignments of error.....	32
Summary of argument.....	33
Argument.....	37
Conclusion.....	51

TABLE OF CASES CITED

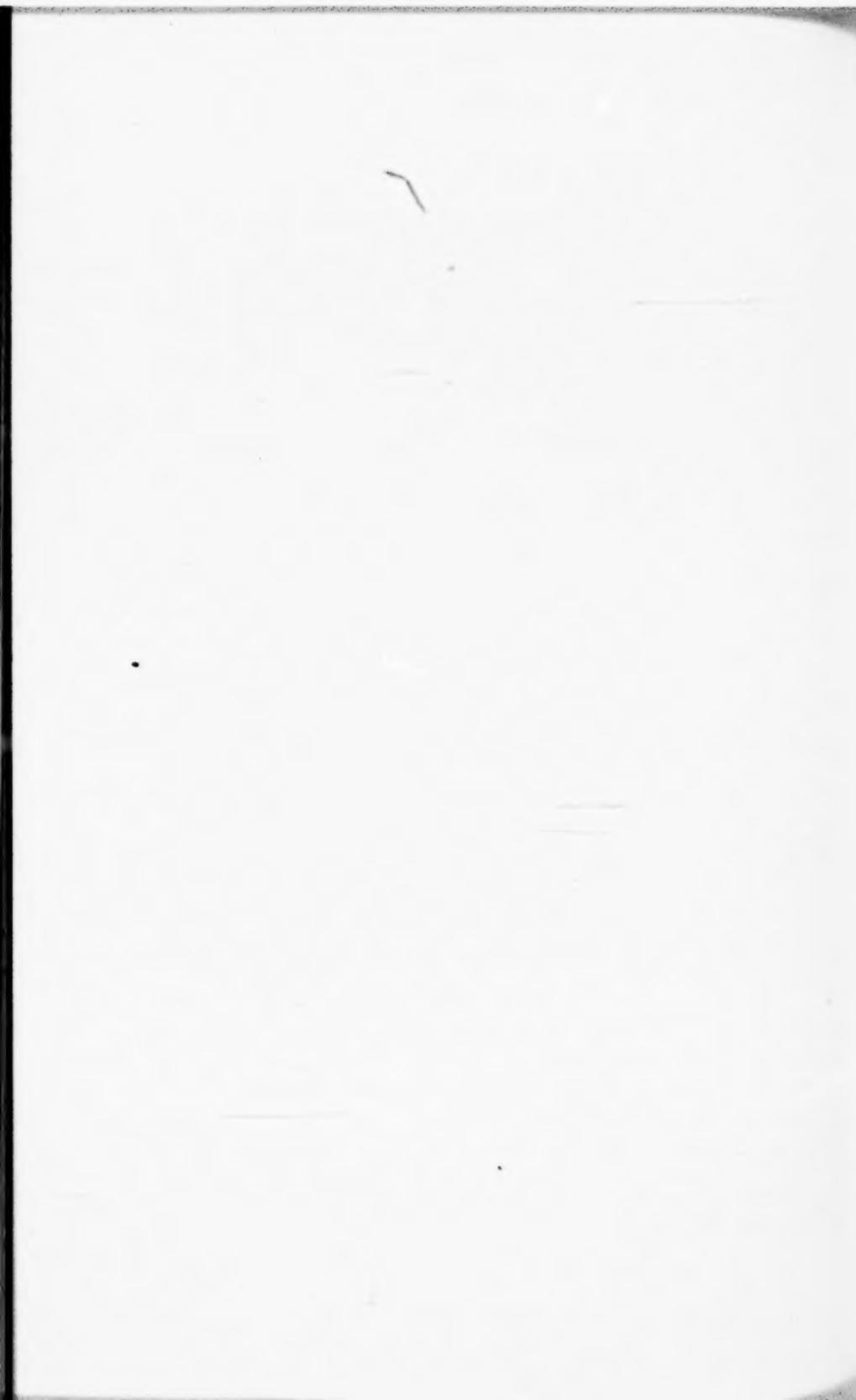
<i>Bailey v. Central Vermont Ry.</i> , 319 U. S. 350, 63 Sup. Ct. 1062, 87 L. Ed. 1444.....	4, 12, 34, 35
<i>Baltimore & Ohio R. R. Co. v. Croeger</i> , 266 U. S. 521, 45 Sup. Ct. 169, 69 L. Ed. 419.....	35
<i>Benton v. St. Louis-San Francisco R. R. Co.</i> , 182 S. W. 2d 61	1, 34
<i>Board of Commissioners of Tippecanoe County v. Lucas</i> , 93 U. S. 108, 23 L. Ed. 822.....	4
<i>Brady v. Southern R. R. Co.</i> , 320 U. S. 476, 64 Sup. Ct. 232, 88 L. Ed. 189.....	4, 9, 11, 34, 36
<i>Cantley v. M-K-E R. R. Co.</i> , 183 S. W. 2d 123.....	34
<i>C. G. W. R. R. Co. v. Rambo</i> , 298 U. S. 99, 80 L. Ed. 1066, 56 Sup. Ct. 693.....	11, 37
<i>Chesapeake & Ohio Ry. Co. v. Kuhn</i> , 284 U. S. 44, 52 Sup. Ct. 45, 76 L. Ed. 157.....	7
<i>Chesapeake & Ohio R. R. Co. v. Martin</i> , 283 U. S. 209, 51 Sup. Ct. 453, 75 L. Ed. 983.....	35
<i>Chesapeake & Ohio Ry. Co. v. Vigor</i> , 101 F. 2d 865, cert. den. 307 U. S. 365.....	8, 34

	Page
<i>Choctaw O. & G. R. Co. v. McDade</i> , 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.....	35
<i>Ecker v. Pettibone</i> , 110 F. 2d 451.....	8, 34
<i>Freeman v. Terminal Ry. Association of St. Louis</i> , 341 Mo. 288, 107 S. W. 2nd 36.....	36
<i>Grand Trunk Ry. Co. v. Ives</i> , 144 U. S. 408, 12 Sup. Ct. 679, 36 Sup. Ct. 485.....	34, 37
<i>Gray v. B. & O. R. R. Co.</i> , 24 F. 2d 671.....	37
<i>Gleeson v. Virginia Midland Ry. Co.</i> , 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458.....	8, 35
<i>Gunning v. Cooley</i> , 281 U. S. 90, 50 Sup. Ct. 231, 74 L. Ed. 720.....	35
<i>Hickox v. McKinley</i> , 311 Mo. 234, 278 S. W. 671.....	5
<i>Jamison v. Encarnacion</i> , 281 U. S. 635, 50 Sup. Ct. 440, 74 L. Ed. 1082.....	7
<i>Jenkins v. Kurn</i> , 313 U. S. 256, 61 Sup. Ct. 934, 85 L. Ed. 1116.....	36
<i>Kansas City v. Smith</i> , 238 Mo. 323, 141 S. W. 1103.....	5
<i>Lilly v. Grand Trunk Western Ry. Co.</i> , 317 U. S. 481, 63 Sup. Ct. 347, 87 L. Ed. 411.....	4
<i>Louisville & Nashville R. R. Co. v. Nelson</i> , 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L.R.A. (N.S.) 84.....	11
<i>May Department Store v. Bell</i> , 61 F. 2d 831.....	37
<i>McAdow v. K. C. Western Ry. Co.</i> , 192 Mo. App. 540, 164 S. W. 188, 240 U. S. 51, 36 Sup. Ct. 252, 60 L. Ed. 520.....	36
<i>Minneapolis & St. Louis Ry. Co. v. Bonbolis</i> , 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961.....	5
<i>Minneapolis & St. Louis R. R. Co. v. Gotschall</i> , 130 Minn. 33, 153 N. W. 120, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995.....	8, 34
<i>Missouri Pacific Ry. Co. v. Aeby</i> , 275 U. S. 426, 48 Sup. Ct. 177, 72 L. Ed. 351.....	7
<i>Mower v. Fletcher</i> , 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117.....	4
<i>Myers v. Pittsburg Coal Co.</i> , 233 U. S. 184, 34 Sup. Ct. 559, 58 L. Ed. 906.....	35
<i>Nashville & St. Louis Ry. Co. v. York</i> , 127 F. 2d 606.....	8, 34
<i>Noce v. St. L.-S. F. Ry. Co.</i> , 337 Mo. 689, 85 S. W. 2d 637	34
<i>Osment v. Pitcairn</i> , 317 U. S. 587, 63 Sup. Ct. 21, 87 L. Ed. 481, 320 U. S. 792.....	4

	Page
<i>Owens v. Union Pacific R. R. Co.</i> , 319 U. S. 715, 63 Sup. Ct. 1271, 87 L. Ed. 1683.....	4, 12, 36
<i>Pitcairn v. Perry</i> , 122 F. 2nd 881, cert. den. 314 U. S. 697	8, 34
<i>Ramsouer v. Midland Valley R. R. Co.</i> , 135 F. 2d 101..	34
<i>Rio Grande Western Ry. Co. v. Stringham</i> , 239 U. S. 44, 36 Sup. Ct. 5, 60 L. Ed. 136.....	4
<i>San Juan Light & Transit Co. v. Requena</i> , 224 U. S. 89, 32 Sup. Ct. 401, 56 L. Ed. 680.....	9, 10, 34, 37
<i>Seaboard Airline v. Duvall</i> , 225 U. S. 477, 32 Sup. Ct. 790, 50 L. Ed. 1176.....	11
<i>Seago v. New York Central R. R. Co.</i> , 348 Mo. 161, 155 S. W. 2d 126.....	34
<i>Smith v. Terminal R. R. Association</i> , 160 S. W. 2d 476..	50
<i>Southern Ry. Co. v. Bennett</i> , 98 S. Car. 42, 79 S. E. 710, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860.....	8, 34
<i>St. Louis, etc. Ry. Co. v. Steel</i> , 129 Ark. 520, 197 S. W. 288.....	36
<i>Swinson v. Chicago, St. P. M. & O. R. R. Co.</i> , 294 U. S. 529, 55 Sup. Ct. 517, 79 L. Ed. 1041.....	12
<i>Tenant v. Peoria & P. U. Railway Co.</i> , 320 U. S. 29, 64 Sup. St. 409, 88 L. Ed. 322.....	4, 11, 34, 35, 36
<i>Terminal Railway Co. of St. Louis v. Staengel</i> , 122 F. 2d 268.....	8, 34, 37
<i>Tiller v. A.C.L.</i> , 318 U. S. 54, 63 Sup. Ct. 444, 87 L. Ed. 610.....	4, 34, 35
<i>Western & Atlanta Railroad Co. v. Hughes</i> , 278 U. S. 496, 49 Sup. Ct. 231, 73 L. Ed. 473.....	35
<i>Williams v. St. L.-S. F. Ry. Co.</i> , 337 Mo. 667, 85 S. W. 2d 624.....	34

STATUTES CITED

<i>Constitution of Missouri</i> , sec. 28, art. 2.....	5
<i>Federal Accident Reports Act</i> , sec. 1, 36 Stat. 350, sec. 38, Title 45, chap. 1, 1935 addition, Code of Laws of the United States.....	49
<i>Federal Employer's Liability Act</i> , Act of April 22, 1908, c. 149, sec. 1 to 8, 35 Stat. 65; 45 U. S. C. A. 51-59..	2, 3
<i>Federal Employer's Liability Act</i> , 45 U. S. C. A. sec. 51.....	7
<i>Judicial Code</i> , sec. 237(b) as amended.....	3



SUPREME COURT OF THE UNITED STATES

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No. 784

CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE
OF WILLIAM L. DEVER, DECEASED,

Petitioner,
vs.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI

*To the Honorable Justices of the Supreme Court of the
United States:*

The above named petitioner respectfully petitions for a Writ of Certiorari to review a decision of the Supreme Court of Missouri (*Benton v. St. Louis-San Francisco Railroad Co.*, 182 S. W. 2d, 61), which decision reversed an order by the Circuit Court of Jackson County, Missouri, granting petitioner a new trial and directing said Circuit Court to reinstate the verdict of the jury and enter judgment for the respondent.

Summary Statement of the Matter Involved

This action was for the recovery of damages for injuries sustained by William L. Dever on July 14, 1932, while employed by the defendant in its Ft. Scott, Kansas yard as a switchman (R. 17). The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, Sec. 1 to 8, 35 Stat. 65, 45 U. S. C. A. 51-59). A verdict was rendered by the jury for the respondent (R. 11, 318). Petitioner filed a motion for new trial upon the grounds that the verdict was against the law and the evidence; that the court erred in the giving of each instruction to the jury, in excluding proper evidence, in admitting improper evidence, because the verdict was for the wrong party and because the verdict was against the greater weight of the evidence (R. 317, 324). Pending the filing of a motion for new trial and the ruling thereon, Dever died (R. 318) leaving a widow, Winnie Dever (R. 92), and the cause was revived in the name of petitioner (R. 319, 323). The motion for new trial was sustained December 17, 1942 (R. 324). The respondent appealed to the Supreme Court of Missouri (R. 325) which reversed the order of the trial court granting a new trial as aforesaid.

There was no dispute as to the applicability of the Federal Employers' Liability Act, it being admitted in open court that both Dever and respondent were engaged in interstate commerce at the time of decedent's injury (R. 110).

Decedent was injured while riding on the rear footboard of the tender of a switch engine (R. 18-23). When it was opposite a switch-stand the switch lever and ball swung upward, toward the track and decedent, struck him on the right ankle (R. 31) and injured him to such an extent that he was seriously and permanently disabled (R. 77, 78, 85, 86).

In the interest of brevity petitioner will not give a full statement of the facts as they will be fully set forth in his brief hereafter.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of Congress February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A. Title 28, Sec. 344), and more particularly Sec. 344 (b) thereof.

The judgment of reversal sought to be reviewed was rendered July 3, 1944 (R. 333). A motion for rehearing and to transfer to the court *en banc* was duly filed, entertained by the court, and denied September 5, 1944 (R. 338). An extension of time within which to file this petition for a Writ of Certiorari was allowed by this Court until December 26, 1944, and petitioner files his petition within such period of time, as extended (R. 341).

This action was based upon the laws of the United States, to wit: The Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1-8 inclusive, 35 Stat. 65, 45 U. S. C. A. Sec. 51-58).

The action of the Supreme Court of Missouri in this case, so far as we have been able to determine, is without precedent, either in the State of Missouri or in any other State. It is clear, however, that one entitled to the benefit of the Federal Employers' Liability Act cannot be deprived thereof by a decision of the Supreme Court of Missouri not reviewable by this Court, and petitioner claims a right and privilege secured to him by the Federal Employers' Liability Act which has been denied by the Supreme Court of the State of Missouri. The following cases, it is believed, sus-

tained the jurisdiction of this Court to issue its Writ of Certiorari:

Osment v. Pitcairn, 317 U. S. 587, 63 S. Ct. 21, 87 L. Ed. 481; 320 U. S. 792, 64 S. Ct. 206, 88 L. Ed. 120; *Brady v. Southern Railroad Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.

Tenant v. Peoria & P. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322;

Lilly v. Grand Trunk Western Railway Co., 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411;

Tiller v. A. C. L., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;

Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Owens v. Union Pacific Railroad Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

Finality of the State Court Judgment

There can be no question as to the finality of the judgment of the Supreme Court of Missouri as it left nothing to the discretion of the lower court except to enter the judgment prescribed by it and the cause was ripe for the issuance of a Writ of Certiorari by this Court as the appellate jurisdiction of the highest court of the State of Missouri was exhausted by the denial of petitioner's motion for rehearing or in the alternative to transfer to the Supreme Court of Missouri *en banc*:

Mower v. Fletcher, 114 U. S. 127, 5 S. Ct. 799, 29 L. Ed. 117;

Rio Grande Western Railway Co. v. Stringham, 239 U. S. 44, 47, 36 S. Ct. 5, 60 L. Ed. 136;

Board of Commissioners of Tippecanoe County v. Lucas, 93 U. S. 108, 113, 114, 23 L. Ed. 822.

Right of Petitioner to a Trial by Jury

Section 28, Article 2 of the Constitution of Missouri provides as follows:

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate; * * * And that in the trial by jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict."

Petitioner therefore cannot be deprived of his right to a trial by jury in this action without his consent. *Kansas City v. Smith*, 238 Mo. 323, 141 S. W. 1103; *Hickox v. McKinley* 311 Mo. 234, 278 S. W. 671; *Minneapolis & St. Louis Railway Co. v. Bonbolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961; Ann. Cas. 1916 E 505, L. R. A. 1917 A 86.

Questions Presented

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act:

1. Does the *res ipsa loquitur* doctrine apply under the facts of this case?
2. May a State court deprive a plaintiff in a *res ipsa loquitur* case under the Federal Employers' Liability Act of the right to have a jury determine the credibility of the witnesses?
3. May a State court withhold from a jury in a Federal Employers' Liability Case where the facts are in dispute and the evidence in relation to them is such that fair-minded men might draw different inferences and conclusions therefrom?
4. May a State court distinguish between litigants in a Federal Employers' Liability Case by holding identical evidence and testimony believable and sufficient to support

a verdict in one case and unbelievable and insufficient to support a verdict in another case of similar or identical aspects?

5. Is the opinion of the court in this case in conflict with the opinion of the highest courts of appellate jurisdiction of other States in Federal Employers' Liability cases?

6. Does the opinion of the court in this case conflict with the opinions of the various circuit courts of appeals or of this Court in Federal Employers' Liability cases?

7. Does the opinion of the Supreme Court of Missouri in this case conflict with other opinions and decisions of the Supreme Court of Missouri in Federal Employers' Liability cases and thereby prevent a uniform application of the Act throughout the State of Missouri or the United States?

8. May a State court deprive a plaintiff of the right of a trial by jury in the guise of determining the sufficiency of the evidence for submission to a jury in a Federal Employers' Liability case by holding that the court could take judicial notice that the injuries received could not have been sustained in the manner shown by plaintiff's evidence or by a consideration of defendant's conflicting evidence?

9. Has plaintiff been unjustly denied the right to a trial by jury in this case?

10. May a State court deprive a plaintiff in a Federal Employers' Liability case of the right to have his evidence submitted to and determined by a jury upon the theory that the *res ipsa loquitur* doctrine cannot be relied upon because plaintiff's evidence as to what caused the injury is so contrary to physical facts as to be unbelievable?

Reasons Relied Upon for the Allowance of the Writ

1. The Supreme Court of Missouri has determined substantial rights of an employee arising under the Federal

Employers' Liability Act in a manner not in accord with the applicable decisions of this Court and has ruled upon a set of facts, in a manner that does violence to the construction of the Federal Employers' Liability Act as set out in the applicable decisions of this Court.

2. The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) provides that:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The act does not define negligence. Rights and obligations under it depend upon the applicable principles of the common law as interpreted and applied in Federal courts. *Missouri Pacific Railway Company v. Aeby*, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351. *Chesapeake & Ohio Railway Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

In the case of *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, this Court said:

"The act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. * * * 'Negligence' is a word of broad significance and may not readily be defined with accuracy."

3. The *res ipsa loquitur* doctrine is applied in the courts of the United States in Federal Employers' Liability cases.

Minneapolis & St. Louis Railroad Company v. Gotchall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995; *Southern Railway Company v. Hattie Bennett*, 233 U. S. 80, 34 S. Ct. 566, 58 L. Ed. 80; *Pitcairn et al. v. Perry*, 122 Fed. 2d 881 (C. C. A. 8, 1941) Cert. den. 314 U. S. 697, 62 S. Ct. 414, 86 L. Ed. 315; *N., C. & St. L. Railway Company v. York*, 127 Fed. 2d 606 (C. C. A. 6, 1942); *Terminal Railway Company of St. Louis v. Staengel*, 122 Fed. 2d 271 l. c. 273 (C. C. A. 8, 1941); *Ecker v. Pettibone*, 110 Fed. 2d 451 (C. C. A. 7, 1940); *Chesapeake & Ohio Railway Company v. Vigor*, 101 Fed. 2d 865 (C. C. A. 7, 1939) Cert. den. 307 U. S. 365, 59 S. Ct. 1031, 83 L. Ed. 1517.

5. The Federal Employers' Liability Act should have a uniform application throughout the State of Missouri and the decision of the Supreme Court of Missouri herein deprives one litigant of the right to a trial by jury upon the theory that the evidence is insufficient for the jury's consideration yet permits another litigant to submit his case to a jury under practically identical evidence, *Freeman v. Terminal Railway Association of St. Louis*, 341 Mo. 288, 107 S. W. 2d. 36.

6. The Supreme Court of Missouri has failed to follow the decisions of this court in weighing, applying and evaluating the evidence in a *res ipsa loquitur* case. *Gleeson v. Virginia Midland Railway Company*, 140 U. S. 435, 444, 11 S. Ct. 859, 862, 35 L. Ed. 458; *Terminal Railway Association of St. Louis v. Staengel*, 122 Fed. 2d 268 l. c. 274 (C. C. A. 8, 1941).

7. This court has never determined whether or not a verdict may be directed in a *res ipsa loquitur* case (*Terminal Railway Association of St. Louis v. Staengel*, 122 Fed. 2d 268 l. c. 274) and in view of the increasing complexity of industrial devices this question is in the fore-

front of developing tendencies in the construction of the Federal Employers' Liability Act; is of general and public interest in its application to cases involving proceedings in state courts and should be determined and settled by this court.

8. The Supreme Court of Missouri failed to apply the test that to justify directing a verdict the court must be compelled to the conclusion that reasonable minds cannot differ as to the insufficiency of the evidence prescribed by this court in the case of *Brady v. Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. Rep. 232.

9. There was no explanation in the evidence as to the cause of the casualty showing lack of negligence on the part of respondent and the opinion therefore conflicts with the case of *San Juan Light & Transit Company v. Requena*, 224 U. S. 89, 99, 32 S. Ct. 401, 56 L. Ed. 680, 684.

10. The holding of the Supreme Court of Missouri was based upon speculation and conjecture and reason not only not shown by the record but in conflict therewith.

11. The Supreme Court of Missouri denied the petitioner the right to have the jury determine the credibility of the witnesses.

12. The Supreme Court of Missouri denied the petitioner the right to a trial by jury.

13. The Supreme Court of Missouri by its opinion in the present case, has declared a principle of law which, if allowed to stand, will be dangerous and far reaching in its effect and so narrow the benefit extended by the Federal Employers' Liability Act as to practically prevent the application of the *res ipsa loquitur* doctrine in such cases and a substantial group of railway employees, entitled to re-

ceive the benefit of the act, will be wholly without a remedy because they are unable to explain the precise manner in which they were injured.

14. The decision of the Supreme Court of Missouri wholly destroys the *res ipsa loquitur* doctrine as applied to a Federal Employers' Liability case as that doctrine is inapplicable under the present decision unless the petitioner knew or could explain the cause of his injury and shift the burden of explanation from the railroad to the employee contrary to the holding of this court in the case of *San Juan Light & Transit Company v. Requena*, supra.

15. If the opinion in the present case is the law, it will open a field for numerous and widespread abuses, enabling railroads to furnish defective, not reasonably safe and dangerous instrumentality and places for their employees with impunity and it will constitute an authority for lower courts to take Federal Employers' Liability Cases from juries by deciding questions of fact and the credibility of witnesses themselves instead of submitting such cases to a jury thereby depriving an injured employee or the dependents of a deceased employee the right extended by the act.

Substantiality of the Questions Involved

A careful investigation of the questions decided by this court, the circuit courts of appeal and the highest state court construing. The Federal Employers' Liability Act reveals no instance in which an employee of an interstate railroad has been denied the benefit of the act in a *res ipsa loquitur* action because the court conceived he must have been injured in some other way than that in which the evidence disclosed, or that his evidence in such a case as to the manner in which he was injured was so unusual and extraordinary as to be contrary to physical facts and unbelievable.

This cause turned upon the effect to be given evidence. Federal questions therefore were the only ones to be decided, to wit:

The right of petitioner to a trial by jury, the right of petitioner to have the jury determine the credibility of the witnesses, and whether or not the evidence was sufficient to submit to a jury.

This requires an analysis and exposition of the facts and such acts for a decision. *Louisville & Nashville Railroad Company v. Nelson*, 218 U. S. 36, 39, 30 S. Ct. 676, 54 Law. Ed. 921, 47 L. R. A. (N. S.) 84. *C. G. W. Railroad Company v. Rambo*, 298 U. S. 99, 80 L. Ed. 1066, 56 S. Ct. 693.

Seaboard Airlines v. Duvall, 225 U. S. 477, 32 S. Ct. 790, 50 L. Ed. 1176.

This is also held by this court in the late case of *Brady v. Southern Railway Company*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189 i.e. 234 as follows to wit:

"There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. • • •

But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. • • •"

Also the case of *Tennant v. Peoria & T. U. Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322 i.e. 410, where a Writ of Certiorari was granted because of

"important problems as to the petitioner's right to a jury determination of the issue of causation," which is the same reason for which this court granted its Writ of Certiorari in the case of *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 and in the case of *Owens v. Union Pacific Railroad Company*, 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

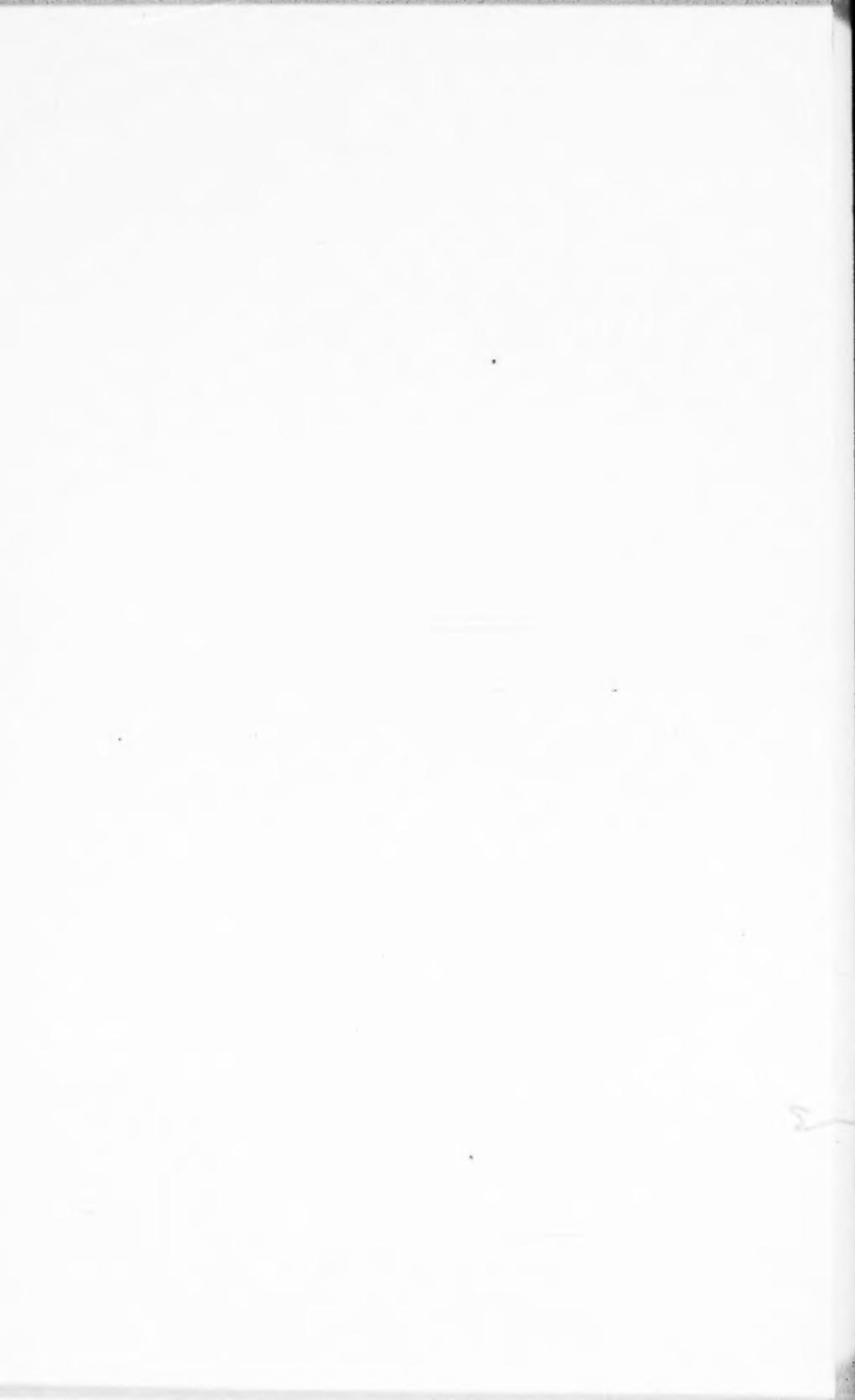
The precise questions which are of importance, herein submitted have not been decided by this court and it should therefore issue its Writ to settle the law in regard thereto as was done in the case of *Swinson v. Chicago, St. P. M. & O. Railroad Company*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

Prayer

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this court directed to the Supreme Court of the State of Missouri commanding that court to certify and send to this court for its review and determination on a day certain therein named a full and complete transcript of the records and proceedings in the case of *Carlton R. Benton, Administrator of the Estate of William L. Dever, deceased, respondent v. St. Louis-San Francisco Railroad Company, a corporation, appellant*, #38601 to the end that this cause may be reviewed and determined by this court as provided for in the statutes of the United States and that said decree and judgment of the Supreme Court of the State of Missouri may be reversed by this honorable court and that petitioner be granted a new trial and for such other and further relief in the premises as to this honorable court may seem meet and just.

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SUPREME COURT OF THE UNITED STATES¹

OCTOBER TERM, 1944

No. 784

CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE
OF WILLIAM DEVER, DECEASED,

Petitioner,
vs.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

Opinion of the Court

I

The opinion of the Supreme Court of Missouri in the case of *Carlton R. Benton, Administrator of the Estate of William L. Dever, Deceased, Petitioner, v. St. Louis-San Francisco Railroad Company, a Corporation, respondent*, is not yet officially reported but was rendered on July 3, 1944, and appears at 182 S. W. 2d 61. Petition for rehearing or in the alternative to transfer to the court *en banc* was filed July 18, 1944, and denied September 5, 1944 (R. 338) without opinion.

II

Statement as to Jurisdiction

The judgment of the Supreme Court of Missouri determined right claimed by petitioner under the Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A. Sec. 51). The jurisdiction of this Court is based upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, in Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A. Title 28, Sec. 344, and particularly Section 344 (b) thereof).

A full statement of the statutes and decisions relied upon as the basis of jurisdiction herein and the nature of the case are fully set out under the heading "Basis of Jurisdiction" in the petition for the Writ of Certiorari herein and will not be repeated here.

The substantiality of the questions involved also appears under that heading in the petition for the Writ of Certiorari herein and will not be repeated at this point.

III

Statement of the Case

Inasmuch as petitioner is relying upon the *res ipsa loquitur* doctrine he was required to develop the evidence to the fullest extent of which the case in its nature was susceptible which requires a more lengthy statement of the case than would ordinarily be necessary. We shall make it as brief as possible consistent with imparting to the court a comprehensive resume of the facts.

William L. Dever was injured on July 14, 1932, while employed by appellant at Fort Scott, Kansas, as a switchman. He had worked for the appellant in such capacity for the past 18 years and regularly performed his duties

(R. 17). He had gone on duty at midnight and was injured about 2:30 a. m. The members of his crew were George Toner, foreman, J. L. Stiles, fieldman, Charles E. Johnson, engineer, Wilbur Kitchen, fireman, and respondent's intestate, Dever. It was dark, the only illumination being a street light about 100 to 150 feet south of where Dever was injured. There was an electric headlight on the engine and Dever carried his lantern and at the time he was injured, he was riding on the east side of the back footboard of the engine (R. 18). The engine was headed north. It was moving south on what is known as the Brockett spur close to the Drake spur. Dever was standing on the footboard which is about 10 inches wide, 2 inches thick and made of hard wood, oak. It extended or had an overhang of about 18 to 24 inches over the rail (R. 19). The footboard was about 8 to 12 inches above the rail and there was a toeboard at the back thereof about 4 or 5 inches high made of the same kind of timber. The footboard was about 18 inches from the rear wheels of the tender (R. 20).

The crew had picked up a car on the house track and backed into the Brockett spur (R. 19), and it was necessary to line a switch at Wall Street and back into the Brockett spur over the switch connecting the Drake spur with the Brockett spur. The switch had been there 23 years to Dever's knowledge. The normal position for the switch was to have the switch point lined for the Brocket spur so that cars could pass in front of the Drake spur without entering it (R. 21). Such was the customary position in which the switch was left and the only way that an engine could get out of the Brockett spur was for the switch to the Drake spur to be in such normal position.

The switch was known as a ground throw switch (R. 114) and was operated by a lever with a ball on the end which worked back and forth, east and west. The lever (switch

stand) was located on the east side of the tracks, was fastened to a tie with an iron plate and was connected with the switch point by a rod (R. 115). It operated in such manner that when the lever was thrown to the west, the switch points would direct traffic into the Drake spur, and when it was thrown to the east, the traffic was directed on into the Brockett spur (R. 117). This switch was also known as a ball-throw switch (R. 179). A photograph of this ball-throw switch appears at record 27 (plaintiff's Exhibit 2) and again at record 195 (defendant's Exhibit K), the lever being shown in different positions in the pictures. When the switch was lined to go past the Drake spur on the Brockett spur, the lever would be thrown to the east and cars could move back and forth on the Brockett spur past the Drake spur without interference. The switch points moved the same direction the lever moved, so that when the lever was thrown to the west, the switch points moved to the west, and when thrown to the east, the switch points moved to the east (R. 22). When the lever was thrown to the west, it lay close to the east rail of the tracks, according to Dever, within two or three inches thereof (R. 22); according to Mr. Freeze, track foreman (R. 177), within from two to six inches of the east rail of the track (R. 212). At the time of his injury, Dever was standing on the east end of the footboard and it was his duty to get off at the switch and "line" it after the car for the Drake spur had passed. He was riding the footboard and looking for a place to get off. The usual and customary place for switchmen to get off to throw the switch was just beyond (south) the tie to which the lever was attached. Plaintiff's Exhibit 2 (R. 26, 27), is a fair representation of the *locus in quo* (R. 23, 25). Dever observed the switch points as he approached them and they were properly aligned for the Brockett spur or the movement then being made as shown in plaintiff's Exhibit 2 (R.

26, 27) and the lever (ball) was properly thrown away from the tracks where it would lay about 5 feet therefrom (R. 29). With the switch aligned for the Drake spur, the lever (ball) would be thrown to the west next to the east rail of the track (R. 30). When Dever reached a point opposite the switch and standing on the footboard, with part of his foot against the toeboard, the lever and ball came over from the east and hit him on the right ankle (R. 31), knocking him into the ditch and injuring him (R. 32).

When an engine or car is run through a switch, if the ball goes in any direction, it goes away from the rail and is bound to go toward the east in the movement being made. It would be impossible, if the engine had run through the switch, for the ball to have been thrown toward the engine or track (R. 30). If the switch had been aligned for the Drake spur when the footboard was opposite the same, the ball would have been directly under the footboard and it would have struck under the footboard, because it can't come up and it would not have been possible for it to have hit Dever because the ball would have been laying within three to six inches of the rail and the footboard extended from 20 to 24 inches east of ~~the~~ rail (to be exact, 22 inches), (R. 31) (R. 212).

Dever's usual and customary place for getting off the footboard to throw the switch was just beyond the same. When he was opposite the switch, he saw a flash and something struck the pants of his left leg and come right on through and hit him on the right leg. His right foot was still on the footboard when he got hit. He was just in the act of hanging down to alight as easily as possible when the ball hit his ankle (R. 33). He suffered much pain (R. 32). Dever lay where he had fallen until the crew could get to him and while he was lying there he saw the lever standing up and moving back and forth until the

engine stopped. He observed that the plate which fastened the lever to the tie was sticking up about 45 degrees on the back side. He could see the spikes sticking up from where he lay just a few feet from the switch. He had never observed the switch to operate like that before. He had done nothing to the switch at all that evening and had not been there for possibly a week. The track at the point where Dever was injured is constructed of used rails of different sizes, different heights, the rails are crooked, the gauge is uneven, the switch points are not the same size as the rails with which they connect (R. 33) (See plaintiff's Exhibit 10, R. 238, 241). They were worn and in a loose and sloppy condition. The switch point on the east side had about three-fourths of an inch of play over the stock rail, which allowed the switch point to raise up and down and it would raise up possibly one inch above the rail and might go one inch below the rail. It was very loose. The throw lever was so loose on the rocker arm that it could be raised to an angle of about 45 degrees before it would start to move the switch points. There was lots of play in the connections. The hole in the pilot rod was twice as large as the pin which fastened it to the lever and the same condition existed with reference to the connection between the pilot rod and the connecting or tie rods, which are the rods that connect the two switch points and cause them both to move simultaneously (R. 34-42). The switch points rested on tie plates that are oiled and are sloping so that the switch may be thrown easily back and forth (see plaintiff's Exhibit 10, R. 238, 241). Dever did not have anything to do with any repairs, servicing, upkeep or inspection of the switch. It was located upon defendant's property and the persons who inspected and repaired the switches were appellant's section men.

The lever was about 30 inches long and the metal plate which fastened it to the ties used as a head block was about 12 by 14 inches. The ball was near the end of the lever and the end of the lever extended a little beyond the ball for a hand-hold. The ball was about 4 or 5 inches in diameter and weighed about 35 pounds (R. 207). There was no latch, dog or other mechanism to hold the lever down (R. 35, 42). When the lever was thrown from east to west or *vice versa*, the switch points would move $4\frac{1}{2}$ to 5 inches. The switch point on the east side was made out of heavier steel than the rail to which it was fastened (see plaintiff's Exhibit 10, R. 241) and was from a quarter to $\frac{1}{2}$ inch higher than the rails which adjoined it on the north, the effect of which was that the switch point would jump when the wheel would hit it (R. 36). Plaintiff's Exhibit 3 is identified as a very good model of track, switch, and switch lever at the place where Dever was injured (R. 39) and is a fair representation of what it looks like and the way it operated at the time he was injured. The purpose of the ball on the end of the lever was to counteract the weight of the engine (R. 40). As Dever was approaching the switch, he saw the track, switch and the ground surrounding. The switch was properly aligned for the movement being made.

After he got out of the hospital, he went to the scene of the accident (R. 41) which was about 8 weeks from the time he got hurt (R. 42).

Ordinarily in operating the switch, it would remain in the position in which it was placed and Dever had no knowledge of the causes which operated to bring about the throwing of the lever toward him at the time he was injured (R. 43). The switch was about 75 feet from the frog (R. 48). Dever was working on the extra board at the time he was injured on account of reduced force. Previously,

defendant had worked 8 switching crews, but at the time he was injured, they were only working 3 and Dever averaged working about half time (R. 51, 52). Dever had brought engines and cars over the switch in question a great many times, mostly at night, as he never did have a regular daylight job (R. 53). In order to get to the Drake commission spur it was necessary to proceed south on the Brockett spur over the switch in question far enough that the car which was being pulled ahead of the engine would clear the switch points. The intention was to throw the switch by throwing the lever toward the rail and head in on the Drake spur, leaving the car and backing out past the switch, throw the switch and proceed about the rest of their business. Dever could see both switch points as he approached the switch, but could not see the ball on the switch. It was no part of his duty to know whether or not the switch was lined (R. 55), but if he had seen it was not properly lined, he would not have permitted the engine to pass through it. If the switch was not properly lined and the engine had gone through, it might have thrown the lever over from the west to the east, or bent the switch point. Something would have to give, because the flange of the wheel would be between the switch point and the west rail and the wheel on the east or left side of the engine would be pressing against the east point and if the switch point was thrown to the east, it would necessarily carry with it an eastern movement of the ball (R. 56). It was Dever's judgment that the switch points were about 8 feet long. He was about 50 or 75 feet north of the points when he observed that they were properly aligned for the movement (R. 57, 58). The switch point to the east was connected to the east rail of the Brockett spur (R. 60) and the switch point on the west was connected with the west rail of the Drake spur (see plaintiff's Exhibit 7, R. 160, 163). The switch points were loosely connected at their north end to the respective rails.

Both the switch points slide back and forth on guide plates easily. The two switch points were connected with a piece of steel at their south end; the two points were connected with a switch (stand) by a bridle rod, which extended from the switch lever to the connecting rods which in turn connected the two switch points at their south end (R. 61). The bottom of the lever was fastened in a steel plate about 12 by 14 by 1 inch and the bridle rod was fastened to the lever at the plate and the lever in turn was fastened to the plate. The center of the steel plate was 34 to 36 inches from the east rail and the lever was about 30 inches long (R. 62). The plate was fastened to what is known as the head-block which was usually a long tie that extended through under the tracks and out a sufficient distance for the lever to be attached, but there was no head block in connection with this switch. They just used ties to take the place of the head-block. Dever had not noticed that the two spikes on the east end of the steel plate were up about three inches before the accident (R. 63). On the night Dever was injured, the switch points and connections were loose and the wheel on the right or west side of the tank would have a tendency to hit the heel of the point toward the west (R. 66) and under such conditions, it would have a tendency to throw the ball back west toward the engine as it hit the switch point. Dever testified that he had previously seen the switch points open and work up and down, but had never seen the lever come over. He had seen the ball raise up and down approximately an inch or two. It was the lever and ball which struck Dever (R. 67). The object which struck him came from the east to the west and could not have struck him going east (R. 68). The accident could have been caused by the wheel hitting the west switch point with the switch plate torn up and loose but Dever did not know whether it was torn up and loose before he was injured or not. The accident happened in a

most unusual manner (R. 69). As the engine approached the switch, Dever saw an opening between the west rail and the switch point and thereby knew that the switch was properly aligned for the movement being made (R. 63), and it was not necessary for him to endeavor to locate the ball in the dark when he knew from the opening between the west rail and the switch point that the switch was properly lined. Consequently, he had no occasion to give the engineer any signals. There was nothing indicating to him that anything was wrong (R. 72).

The width of the tread on car wheels is $4\frac{1}{2}$ to 5 inches. The flange of a car wheel is $1\frac{1}{8}$ to $1\frac{1}{4}$ inches thick. The standard throw between the switch points and the rail is $5\frac{1}{2}$ inches. The standard gauge of a railroad track is 4 feet, $8\frac{1}{2}$ inches. There was no head-block at all for the switch stand, it just being fastened to two ties extending over the ditch, as shown by plaintiff's Exhibit 10 (R. 238, 241). Ordinarily a head block is used which is a solid, continuous piece of timber extending clear through under the tracks, even with the ties. This strengthens the mechanism of the switch, and makes it more rigid (R. 73). If the switch had not been set for the movement they were making at that time and the ball had been caused to move in any direction, it would have been toward the east and not toward the west. If the wheels are on the east switch point and on the west rail of the tracks, it is impossible for the ball to flop over toward the west unless the switch plate was defective, and the switch points open. If the switch is set against the movement, the flange of the wheel pressed against the switch point and would have a tendency to cause the ball to move toward the east, away from the rail, which would be away from Dever. If the switch had been set against the movement and Dever was at a point on the footboard immediately opposite the ball and the

engine was running through the switch, it would have been impossible for the ball to have struck him (R. 74, 75) because it would have come up under the footboard, which it could not clear, as the footboard extended 18 inches over the rail and when the switch was thrown with the ball toward the rail it was so close Dever had often struck his knuckles on the rail in raising the ball and lever to throw the switch (R. 75).

Every member of the train crew appeared and testified at the trial. G. E. Toner, switch foreman (R. 111), Wilbur G. Kitchen, fireman (R. 227), G. L. Stiles, fieldman (R. 247), C. E. Johnson, engineer (R. 262) and in addition thereto, N. T. Freeze, track foreman (R. 177, Paul McCrum, another engineer (R. 277) and G. L. Swearingen, general yardmaster (R. 283), all testified.

Toner testified that the ball and lever were attached to an iron plate which in turn was fastened to one of the ties (R. 115-116), that switch points did not fit up exactly and the spikes in the tie plate were loose that they made a test with the switch thrown against the movement and the lever flopped over when the engine came back (R. 121-122). He had been familiar with the switch stand for 22 years (R. 122). That they found a notch on the bottom of the footboard that looked as though the ball had struck it and if the ball came over from west to east it could hit a man's foot (R. 124). The switch points move about 5 inches when the switch is thrown, which means that the connecting (bridle) rod is fastened about $2\frac{1}{2}$ inches from the center of the bolt that holds the lever to the plate. That the wheels of locomotives, switch engines and tenders become worn from constant use and the flange gets thin so that they have to put them on a lathe and turn them down (R. 126, 127). The track in question was not kept up like main line tracks and never is. He could not tell by looking at them

whether or not they were constructed of old material. The tread of the wheels is about 4 inches and the top of the rails from 2½ to 3 inches wide (R. 127). He never saw a rail changed on that track in his time. He couldn't say whether they were all of the same size or not, even though he had been looking at them for 22 years. The switch points worked back and forth on tie plates extending under them for the distance they moved and that the section men put heavy grease on them. The spikes in the switch plates were loose. He testified that he never examined the switch mechanism (R. 128); that it was not his duty to examine switches; that it was not Dever's duty to examine switches; that the only thing he did was to throw them when they used them; that he did not have anything to do with the inspection, up-keep, maintenance or repair of the switches (R. 129) and neither did Dever (R. 130); that they had run through switches lots and lots of times (R. 153); that the engine men are supposed to know if the switches are properly aligned; that the railroad required Johnson, the engineer, to know whether or not the switch was open or closed, but he never asked him anything about it at the time, nor did he ask Dever (R. 154). In the 22 years he had worked for the defendant, he had never heard of a man standing on the footboard of an engine being injured by a switch lever when a switch was run through; that he saw Dever fall off the footboard; they made tests of the switch because they did not know whether it happened on account of the switch or what caused it (R. 155); that the purpose of the ball was to hold the lever down (R. 157); that when the lever is thrown to the east or west, it ordinarily, usually and customarily remains in that position and that it would be most unusual and extraordinary if it moved when a train was passing over the switch unless it was running through the switch, but if the train was running through the switch, it would

throw the ball away from the tracks; that if the switch lever did not hold the switch points in proper position, they probably would work loose and move in any direction; that the tracks were not straight; that there is a little more motion to a switch engine moving on industrial tracks than on a mainline track (R. 158) and that consequently that will throw one end or the other against one side of the other of the rails of the tracks (R. 158) if there is a little curve, whatever way the curve is (R. 159); that he never noticed anything dangerous about the tracks; that all he ever did was just to throw the switch (R. 166) that the spikes were loose in the plate; that the plate had been there for years (R. 168); that he heard them driving spikes coming back from calling a doctor; that no test was made with the switch properly aligned; that they now have a lock, latch or hook on ground throw switches; that if the switch and points and everything were operating normally, properly and usually, there was no way that the switch lever could have been thrown toward the west (R. 172) and if it did fly over to the west, it would be a most unusual and extraordinary occurrence; that for a time switchmen were not permitted to ride on the footboard in the direction in which the engine was moving (R. 174); that by "running through a switch" is meant passing over a switch that is improperly set for the movement being made (R. 176).

Mr. W. T. Freeze was yard foreman for the defendant at the time Dever was injured and had charge of the yards and the tracks and switches in the yards. He had been there on the position continuously since 1917 and was familiar with the Brockett spur (R. 177) and the Drake spur and was familiar with the switch that controlled the movements of engines and cars in and to the Drake Commission switch track (R. 178). It was part of his regular duty to make regular inspections of this switch. This switch was called

a ball throw switch (R. 179) and when the switch was set for an engine or cars to go south on the Brockett spur, the west point would be away from the west rail and the east point would be next to the east rail and the ball of the switch would be over to the east. The track is not first class; it is fair back track (R. 180). He inspected the switch about 2 or 3 times a week and he had inspected the switch at 3:00 p. m. the evening before Dever was injured by looking it over to see if it was O. K. and throwing the switch and found it in "pretty good shape" (R. 181-184). The points slide on split plates the points are supposed to be higher than the lead rails, otherwise they will cut the lead rail (R. 182) and catch and turn the lead rail over. The plate was about 10 inches square (R. 183). The plate was securely fastened when he inspected it. No spikes were pulled up. The rod and the switch points appeared to be all right (R. 184) and he inspected the track in the vicinity of the switch and there was nothing wrong with the track or rails (R. 185). Some of the rails with which the Brockett spur was constructed were worn more than others, and on the night of the accident, he was called to the scene by Debobbin, the yard master (R. 186). He testified that he found the spikes on the front side of the switch stand pulled up about $1\frac{1}{2}$ inches and the back side about $\frac{1}{2}$ inch (by front side he means the one next to the rail). They were not pulled up at 3:00 p. m. the preceding afternoon; the connecting rods and the head rod were bent. When the ball was thrown toward the rail the west point did not touch the west rail by about 1 inch. The switch had fit snugly both ways that afternoon when he examined it (R. 188-189). When a switch had been run through, it will either pull the spikes or bend the rods (R. 190). The next morning they made tests by running an engine through the switch with the ball thrown toward the west, and it threwed

the ball over to the east. The switch points are 15 feet long and the switch stand and switch ball are right at the south end of the points. The engine was backed through the points when they made their test. The wheels of the tender were 3 feet 8 inches from where they set on the rail to the back end of the footboard (R. 191). Defendant's Exhibit K (R. 193, 195) is a picture of the engine going through the switch when it was thrown the wrong way for the movement, and when they made their test, the ball began to raise before the footboard got even with it (R. 192). The picture was taken at the time the tests were being made (R. 193). When the engine went through the switch, the ball raised up and was thrown over to the east and after the engine had passed through the switch, the wrong way for the movement, the ball was over to the east. Witness identified plaintiff's Exhibit 2 (R. 26-27), as being a fair representation of the way the switch and ball looked after the engine had passed on to the south (R. 199). The switch stand had been in use for more than 30 years to witness' knowledge. He testified he was about 10 minutes inspecting and manipulating it the afternoon before Dever was injured (R. 203). The holes and bolts in the switch connections wear and the switch was loose (R. 204). There was $1\frac{1}{2}$ inches play in the lever before it would move the points which move $5\frac{1}{2}$ inches for a full throw (R. 206). The switch in question is the only ground throw stand the witness ever found with the spikes pulled up that way in his 34 years' experience (R. 208). He considered it unusual and he had seen hundreds of switches that had been run through. The head block was decayed. Two or three days thereafter they put up another switch stand. There was no lock or latch on the switch lever and the weight of the ball was all that was supposed to hold it down (R. 209). If the switch was loose the points would move any way. At

the time Dever was injured, the defendant kept two crews working all of the time, one on the north and one on the south end (R. 210). When the ball was thrown toward the rail it would lay within from 2 to 6 inches thereof and the overhang of the footboard was 22 inches (R. 212-213). It would be unusual and extraordinary for a switch lever to flop over and hit a man on the footboard (R. 213). When tests were made the following day the plate was not pulled up by running through switch (R. 214).

Wilbur G. Kitchen testified that he was the fireman on the switch engine at the time Dever was injured (R. 227). When a switch is properly set an engine goes over it and when improperly set it goes through it (R. 231, 278). When they made tests they backed through the switch set against the movement and the lever just raised up and went over to the east (R. 232, 251, 279). There is a rule that the engineer is bound to know before he proceeds over the switch points whether they are properly aligned for the movement (R. 233). This rule is number 1188 of plaintiff's Exhibit 9 (R. 234-235), and is as follows, to wit:

"When approaching switches, the engine man must know that they are in proper position".

It was the engineer's duty to obey the rule (R. 235).

Kitchen was the first one to Dever and Dever said "Look at that switch, the doggone thing hurt me" (R. 245). When an engineer runs through a switch he is disciplined (R. 246).

Sometimes from long wear, the flanges of wheels become thin and the tread cupped and they are taken to the round house and turned down (R. 247).

Kitchen further testified it was his duty to see whether or not the switches were properly set (R. 235) and there was nothing to prevent him seeing how the switch was

aligned as the fireman is required to watch the crossing and they were moving toward the First Street crossing (R. 236) and in order to see down to the First Street crossing, it was necessary to look right over the switch points in question (R. 237). After a most searching cross-examination (R. 235-244), the most that the fireman would admit as to whether or not he saw or could have seen the switch points as the engine approached them, was that he couldn't see them from the position he was in (R. 244).

J. L. Stiles, fieldman, had worked for the defendant at Fort Scott for 48 years (R. 247), 25 of which were as a switchman (R. 248). He testified that when a switch is set improperly for a movement, the ball would go over to the east (R. 251), and when it was properly set, the ball would lay to the east (R. 250). The plate which fastens the lever to the head block or tie and the spikes holding it down were pulled to the west. There were 4 spikes in it (R. 255, 257). In other words, they were pulled over toward the tracks and the witness is sure that is correct. If the train got on the switch points and they slid to the west it might pull the switch plate to the west (R. 257). During the course of this witness' examination, it was admitted by counsel, out of the presence of the jury, that the switch stand had been removed (R. 259-260). Witness Stiles further testified that the headlight on the tender would illuminate the switch points easily, to determine whether or not they were open, from a distance of 75 feet to the north thereof, and he thought the headlight would sufficiently illuminate them from a distance of 200 feet. That from the cab looking toward the rear, the switch points could be seen when the tender was distant therefrom a space of 30 or 40 feet (R. 260-261).

C. E. Johnson was the engineer of the switch engine at the time Dever was injured and had been in the employ

of the company at Fort Scott for 33 years (R. 262). The Brockett switch track starts about 150 feet from the Drake spur and is on a curve practically all of the way until the Drake spur is reached; that he could not see the switch points before they moved over them because a car on the Drake spur interfered with his vision (R. 264, 268). As soon as he knew Dever was hurt, he went to him and Dever told him the switch stand lever had hit him (R. 265). He had passed over the switch numerous times in the last 33 years (R. 269); that if the switch was set properly for the movement, the lever could not flop toward the west (R. 269). He doesn't know whether Dever got off the footboard or fell off the footboard, but he saw him fall (R. 271); that from his position in the cab of the engine he could look over the back of the tender and see the ground 25 feet from the tender (R. 273). He had 30 feet in which to determine whether the switch points were open and never looked to see whether or not they were open (R. 263). He testified he didn't think that rule 1188 admits of any exception and the railroad company penalized him when he violated the rule (R. 274). He was not penalized for running through the switch on this occasion and if the switch was aligned for the movement being made, it would be most unusual for it to fly over and strike Mr. Dever; that he had run through switches before (R. 275) previous to Dever's injury. There had been a bulletin out forbidding switchmen riding upon the footboard in the direction the engine was going and at the time Dever was injured there was a bulletin out permitting one man to ride on the footboard in the direction the engine was moving (R. 277).

Paul McCrum was employed by defendant as an engineer at the time Dever was injured (R. 277) and was present when the tests were made the day following his injury (R. 278-279). He testified it was his duty in backing over switch points to see that they were properly aligned and

that it was the positive duty of all engineers on the Frisco so to do (R. 280); that it was nothing unusual to run through a switch improperly aligned (R. 281).

P. L. Swearingen testified he was general yardmaster of the defendant at the time Dever was injured (R. 283); that they made tests the next day to determine the cause of his injury (R. 283-284); that no spikes were pulled from the plate while making the tests (R. 287); that when they properly lined the switch and went over it with the engine after the spikes holding the plates had been pulled the whole thing was pulled to the west (R. 287-288), and from 3 to 5 days thereafter respondent placed a chain on the switch (R. 288-289), but that on the day the tests were made, there was no chain on the switch and the witness' attention was called to plaintiff's Exhibit 2 (a picture furnished by the defendant (R. 26, 27)), and finally when pressed he said: "I don't know if it is a chain" (R. 289) and on page 290 said "I don't think it is a chain"; that if the switch was set against a movement to the Brockett plant when the tender got up near the switch, the ball would flop to the east and that he did not see how it could have hit Dever (R. 291); that when an engine runs through a switch it will "jim" the switch points (R. 290); that the points on this switch were not "jimmmed"; that the switch point remained right up against the west rail when the lever was nearly half way over (R. 291); that 20 or 30 years ago they used to run through switches, but that every switch they have today (December 13, 1937) has a dog on it, and "if that switch would have been laying there fixed to a dog, there would be no way to let loose and come over because those dogs will hold it"; that they have dogs on the switches to keep them from flopping up and hitting a fellow (R. 295).

There was a loss of the joint between the astragalus and the scaphoid bone with exostosis of bony growth ex-

tending out on the forward part of these bones resulting in a permanent disability for which there could be no relief (R. 76, 77, 78). There was severe dislocation and dissipation of the ankle joint, the movement of which was very limited. It will always be painful and will never improve. Fracture or dislocation of the bones and sometimes an erosion where there is injury to the ankle bone will cause traumatic arthritis (R. 85, 86).

At the risk of repetition and length petitioner has stated the evidence with considerable detail in order that the court may be fully apprised thereof and to show that all of the evidence of which the case in its nature is susceptible was adduced by the plaintiff below and supplemented and strengthened by that of the appellant. A reference to the pleadings and the instructions in the case will demonstrate that both the plaintiff and defendant tried the case upon the theory that the doctrine of *res ipsa loquitur* applied. The defendant requested 21 instructions, 13 of which were given and 9 of which were refused, and an inspection of these instructions shows not only that the defendant did not offer a single instruction based upon the theory that the doctrine did not apply but given instructions "J" (R. 308), "M" (R. 309) and "O" (R. 310) and refused instructions "E-1," "L-1," "M-1," "M-2," (R. 312) "O-1," "P," "Q" (R. 313) and "R" (R. 314) requested by the defendant show that it tried and submitted the case upon the theory that the doctrine applied.

IV

Assignments of Error

1. The court erred in holding that the evidence was insufficient to support a verdict for petitioner under the Federal Employers' Liability Act.

2. The court erred in holding that petitioner was not entitled to have a jury determine the liability under the facts of this case and under the Federal Employers' Liability Act.
3. The court erred in holding that petitioner did not have the right to have a jury determine the credibility of the witnesses under the Federal Employers' Liability Act and in this case.
4. The court erred in refusing to apply the Federal Employers' Liability Act uniformly throughout the state of Missouri.
5. The court erred in distinguishing between litigants in the same jurisdiction.
6. The court erred in assuming to take judicial notice that if the switch was properly set for the movement, the lever and ball could not have been thrown towards the west while the engine was moving over it.
7. The court erred in ignoring or failing to give effect to competent and relevant evidence bearing upon the questions presented.
8. The court erred in not affirming the order of the trial court and remanding the cause even though petitioner did not make a case under the *res ipsa loquitur* theory because the opinion conceded that if Dever was not injured in the manner he thought he was then he was injured by "some negligence on the part of the crew."

Summary of the Argument

1. The *res ipsa loquitur* doctrine applies in all its fullness to Federal Employer Liability Cases as construed by this court, the Circuit Court of Appeals, the various state courts,

and particularly the Supreme Court of Missouri. *Minneapolis & St. Louis Railway Co. v. Gotschall*, 130 Minn. 33, 153 N. W. 120, Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955; *Southern Railway Co. v. Benton*, 98 S. Car. 42, 79 S. E. 710, aff. 233 U. S. 80, 86, 34 S. Ct. 566, 567, 58 L. Ed. 860; *San Juan Light Co. v. Requina*, 224 U. S. 89, 98, 32 S. Ct. 99, 401, 56 L. Ed. 680; *C. & O. Railway Co. v. Vigor*, 101 Fed. 2d 865 (C. C. A. 7, 1939), cert. den. 307 U. S. 365, 83 L. Ed. 1517, 59 S. Ct. 1031; *Pitcairn v. Perry*, 122 Fed. 2d 881 (C. C. A. 8, 1941), cert. den. 314 U. S. 697, 62 S. Ct. 414, 86 L. Ed. 315; *Nashville & St. Louis Railway Co. v. York*, 127 Fed. 2d, 606 (C. C. A. 6, 1942); *Ecker v. Pettibone*, 110 Fed. 2d 451 (C. C. A. 7, 1940); *Ramsouer v. Midland Valley Railroad Co.*, 135 Fed. 2d 101 (C. C. A. 8, 1942); *Terminal Railroad Association of St. Louis v. Staengel*, 122 Fed. 2d 268 (C. C. A. 8, 1941); *Benton, Administrator, v. St. L.-S. F. Railway Co.*, 182 S. W. 61 (S. Ct. of Mo.) (This case); *Cantley v. M-K-E. Railroad Co.*, 183 S. W. 2d 123 (S. Ct. of Mo., not yet officially reported); *Williams v. St. L.-S. F. Railway Co.*, 337 Mo. 667, 85 S. W. 2d 624; *Noce v. St. L.-S. F. Railway Co.*, 337 Mo. 689 (85 S. W. 2d 637).

2. It is only where the facts are such that from them all reasonable men would draw the same conclusion, that questions of negligence cease to be "questions of fact" and become questions of law for the court. Otherwise, such questions are for the jury. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. Ed. 485; *Tiller v. Atlantic Coast Line Railway Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Brady v. Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189; *Tennant v. Peoria & P. U. Railway Co.*, 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322; *Seago v. New York Central R. R.*

Co., 348 Mo. 161, 155 S. W. (2) 126. Reversed without opinion 315 U. S. 806; 62 S. Ct. 806.

3. It was the function of the jury to weigh contradictory evidence, determine the inferences, judge the credibility of the witnesses and draw ultimate conclusions as to the facts.

Tenant v. Peoria & P. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322;

Tiller v. A. C. L., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;

Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;

Chesapeake & Ohio Railroad Co. v. Martin, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983;

Myers v. Pittsburg Coal Co., 233 U. S. 184, l. c. 192, 193, 34 S. Ct. 559, 58 L. Ed. 906;

Baltimore & Ohio Railroad Co. v. Croeger, 266 U. S. 521, 524, 527, 45 S. Ct. 169, 69 L. Ed. 419;

Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. Ed. 96;

Western & Atlanta Railroad Co. v. Hughes, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473;

Gleeson v. Virginia Railroad Co., 140 U. S. 435, 444, 11 S. Ct. 859, 862, 35 L. Ed. 458.

4. The purpose of the Federal Employers' Liability Act was to establish uniformity of decision and similar treatment to all railroads and their employees throughout the United States, subject to the provisions of the act, and the Supreme Court of Missouri had failed to apply the act uniformly by denying liability in the present case upon

similar or identical evidence it held established liability in another case.

Brady v. Southern Railway Company, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.

St. Louis, etc., Railway Co. v. Steel, 129 Ark. 520, 197 S. W. 288;

McAdow v. K. C. Western Railway Co., 192 Mo. App. 540, 164 S. W. 188, aff., 240 U. S. 51, 36 S. Ct. 252, 60 L. Ed. 520.

Freeman v. Terminal Railway Ass. of St. Louis, 341 Mo. 288, 107 S. W. 2d 36.

5. All of the evidence indisputably established that the switch was properly set for the movement but the court ignored or failed to give effect to the competent and relevant evidence adduced to that effect, and placed the burden upon the plaintiff of offering an explanation of how he got hurt thereby destroying the very reasons for the existence of the *res ipsa loquitur* doctrine, to wit: that plaintiff could name no specific negligence of the defendant and hence was required to rely upon the doctrine.

However, this Court on certiorari, is not confined to a consideration of the evidence stated by the Supreme Court of Missouri in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a federal right by the opinion and judgment below.

Brady v. Southern Railway Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.

Tenant v. Peoria & T. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322.

Owens v. Union Pacific Railroad Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

Jenkins v. Kurn, 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 1116.

Y

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 99, 32 S. Ct. 401, 56 L. Ed. 680, 684.

Terminal Railroad Ass. of St. Louis v. Staengel, 122 Fed. 2d 268, l. c. 275.

Chicago Great Western R. Co. v. Rambo, 298 U. S. 99, 56 S. Ct. 693, 80 L. Ed. 1066.

Argument

It is not only admitted herein that the case was brought, tried and decided upon the *res ipsa loquitur* theory but all of the evidence conclusively establishes that it was one to which the doctrine was properly applicable. No two *res ipsa loquitur* cases are alike and hence it is practically impossible to cite cases similar in all of their details as authority and where the doctrine applies the question as to whether or not the case should be submitted to a jury is one to be determined upon the facts in each case.

Gray v. B. & O. Railroad Co., 24 Fed. 2d 671.

The rule is that the question of negligence under the doctrine is generally for the jury and only by an appraisal and consideration of the facts in evidence in each particular case can the application of the doctrine be determined.

Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 683, 36 S. Ct. 485.

May Department Store v. Bell, 61 Fed. 2d 831 (C.C.A. 8, 1932).

Under the Federal Employers' Liability Act respondent was liable for injury to decedent.

"* * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency due to its negligence, in its * * * machinery, tracks, roadbed, work * * * or other equipment."

Liability under the act is to be fixed by the common law as interpreted by the Supreme Court of the United States. That law embraces the *res ipsa loquitur* doctrine and consequently applies to the interpretation and construction of the act as shown by the cases cited in our summary of argument. (Here appropriate quotations may be made.)

The opinion of the Supreme Court of Missouri practically admits that Dever's injuries resulted from negligence, on the part of the crew in "running the switch". Yet despite the statutes reversed the case and ordered a judgment entered for the respondent "because Dever's claim for damages was based wholly upon the theory that the switch was properly set for the movement." The court, therefore, decided that Dever was injured because the respondent's crew was guilty of negligence in "running a switch" although all the evidence of both Dever and the other members of the train crew except the conclusions of some experts was to the effect that the switch was not "run". If the respondent was so convinced that the running of the switch had caused Dever's injuries why were the numerous tests made by it to determine the cause (R. 121, 191, 199, 201, 202, 283)? These alleged tests were made by "running through the switch" when it was set against the movement and when it was set for the movement (R. 171, 172, 200, 202). When they made these tests with the switch set against the movement it just caused the ball and lever to "flop" over toward the east (R. 166, 199) and when they ran over the switch when it was set for the movement it had no effect on it (R. 202), yet despite all of this testimony of the respondent to the effect that the switch was in good working order, respondent's general yardmaster testified they put a chain on the switch from three to five days after Dever was injured (R. 288, 289) and Freeze, the track foreman (R. 177), testified they replaced the switch sometime within two or three days thereafter and that the headblock

was a little decayed (R. 209) and defendant admitted in open court that they removed the switch after Dever was injured (R. 259). The removed switch stand was not produced or offered in evidence by the respondent. Freeze testified that the ground throw switch in question was the only one in his 34 years of experience from which he found the spike had been pulled (R. 208); that there was no lock or latch on the switch and that the weight of the ball was supposed to hold it down (R. 209). Freeze was track foreman and further testified that the switch points were supposed to be a little higher than the adjacent rail against which it rested (R. 182, 183). Yet the particular switch point herein would raise sometimes one inch above the adjacent rail and sometimes fall one inch below the adjacent rail when pressure was on the points (R. 32-34). Furthermore the general yardmaster, Swearingen, testified on direct examination that in making the test following Dever's injuries they pulled all of the spikes from the plate, set the switch for proper movement over it and that when the engine passed thereover the whole thing was pulled over to the west (R. 287). Thus it is seen that the defendant's own testimony completely refutes the finding of the Supreme Court of Missouri that:

"If the switch was properly set for a movement south on the Brocket spur which would be as plaintiff's Exhibit 7 illustrates, then the switch lever and ball could not have been thrown the west while the engine was moving over the switch."

182 S. W. 2d l. c. 63, because if the flange of the wheel was pressing against the switch point toward the east with such force that it maintained the point in its proper position then under the learned commissioner's theory, the switch point could not have moved toward the west, whether it was attached to the switch stand or not because the flange

of the wheel was pressing against the west side of the east switch point. But under Swearingen's testimony when the tests were made and the spikes pulled and the lever and points properly aligned for the movement, when the engine got on the switch point, it pulled everything toward the west (R. 287-288). This is the testimony of an eyewitness to the test produced by the respondent and testifying upon direct examination. This is exactly what happened when Dever was injured with the exception that the plate was spiked down at that time and the weight of the engine was so great pulling to the west that it pulled the lever and ball up and over until it struck Dever and the footboard and could go no farther. Whereupon, to relieve unexhausted pressure still being exerted by the switch point pulling on the lever, the switch plate was torn up. The fact that the flange on the west wheel was between the west switch point and the west rail would have no significance as the gauge of the switch point was $5\frac{1}{2}$ inches less than the gauge of the rails between which they moved and operated (R. 73, 207). The thickness of the flange was only $1\frac{1}{4}$ inches (R. 73) which would permit the switch points to move 4 and $\frac{1}{4}$ inches to the west before the west switch point would contact the flange of the west wheel and its movement stopped. Therefore, inasmuch as the whole throw of the lever at the point of its connection with the connecting rod which ran therefrom to the switch point was only $5\frac{1}{2}$ inches, (the total movement of the switch point back and forth between the rails) and as the points could therefore move four and $\frac{1}{4}$ inches before being arrested in their movement by the flange of the west wheel a pull on the lever could be exerted causing the ball and lever to move nearly $\frac{4}{5}$ of the distance of the arc of 180 degrees described by them in being thrown from the east to the west and as the overhang of the footboard east of the east rail

was 22 inches, it is easily seen how Dever could have been injured by this most unusual and extraordinary movement of the switch lever and ball and completely destroyed the theory of the learned commissioner of the Missouri Supreme Court expressed in the opinion as the ball and lever, when thrown toward the track, would lay within about 6 inches of the east rail thereof and the footboard overhanging the east rail 22 inches (R. 212).

There are several theories which could account for the unusual and extraordinary operation of the switch in question and its controls at the time Dever was injured, among which are the following:

Decedent testified that the plate was pulled upon the side away from the track (R. 33), which could only be accomplished by a pull to the west and in this he was corroborated by brakeman Stiles (R. 255-257). It therefore must be admitted that if the switch stand was pulled up, and toward the west, that some physical force must have been applied in that direction and as the stand was connected with the switch points only, such force could only be applied from the switch points, that would be sufficient to pull up the plate, and this might readily have been accomplished in view of the testimony that the tie to which the plate was attached was somewhat decayed (R. 209). If, on the other hand, the plate was pulled up prior to the time decedent was injured, then in view of the looseness of the connection, the gauge of the track, the fact that the points slid back and forth easily on the sloping, greased tie or switch plate, that there was $4\frac{1}{2}$ to $5\frac{1}{2}$ inches difference between the gauge of the switch points and the gauge of the track; that the wheels of the cars were $4\frac{1}{2}$ to 5 inches across the tread (R. 33-36, 73) and the ball of the rail only $2\frac{1}{2}$ or 3 inches (R. 127) across; that the switch points

would become depressed as much as one*inch below the adjacent rail (R. 34), all would tend to cause the switch points to move to the west for the following reasons:

The inside gauge of the wheels is the same as the gauge of the track, of which fact court takes judicial notice, and the wheels of the tender would overhang the rail or switch points' surfaces (providing they were standard gauge) at the north end and on the east side at least $1\frac{1}{2}$ inches, being the difference between the tread of the wheel and the width of the rail at its widest place, but as the wheel would advance to the south on the east switch point, the overhang would become greater because the switch points narrowed to a fine point as they approached the adjacent rail against which they would lay (see exhibits 7, K and L (R. 26-27, 193-195)) and if a switch point was depressed by the weight of the tender until it was one inch below the stock rail upon which no weight would rest until the wheel of the tender reached it, then the outside, or east edge of rim of the wheel would strike the inside of the east stock rail (east track of the Drake spur) several feet north of the extreme south end of the switch point an inch below the top of the adjacent rail (R. 34) which would cause thousands of pounds of pressure between the wheels and the channel or west side of the east rail and as a consequence thereof, the east rail would have to give or the wheel would have to give (R. —) and as nothing was found wrong with the east rail, as the wheels of the tender were not permanently fixed and as the switch points were movable, it stands to reason that the east wheel of the tender was pushed or slid to the west as it advanced southward. Consequently pressure would be applied toward the west, and as the wheel was on the switch point, such pressure would be communicated by the friction of the wheel and the weight of the tender upon both of the switch points (com-

municated through the tie rod connecting the East switch point to the west switch point) and this would be sufficient to move the points and the wheels of the tender to the west until the flange of the west wheel made contact with the channel or east side of the west rail, which would then cause the east wheel of the tender to override and mount the east rail and this would be particularly true if the treads of the wheels of the tender were worn and cupped and in this particular case, after the wheels had passed the south end of the switch points, they would then spring back to the east side because they were only attached at their north end and the lever and ball, not having been permitted to fall to the position they would ordinarily be in, with the switch points to the west, by reason of having struck decadent, would fall back after the east wheel had mounted the east rail because after that took place, there would be no weight or pressure at all upon the cast switch point and as stated in the evidence, the switch points could move any direction. The weight of the tender would be wholly upon the stock rail adjacent to the switch points and in addition thereto, the flange of the following wheel going between the west switch point and the west rail would tend to force the switch points to the east at least for the distance of the width of the flange, or $1\frac{1}{4}$ to $1\frac{1}{2}$ inches. However, there is no evidence in the record as to the position of the switch points or the ball and lever after the engine and tender had stopped. It will, therefore, be seen by this hypothesis that the east wheel, instead of pressing against the east switch point, as claimed by the defendant, and as set forth in the opinion, would in reality be on the east switch point and pressing against the east rail toward the east until it mounted it and the tread of the wheel would be pressing against the switch point toward the west. It appears to the writer that this hypothesis is un-

answerable and such conclusion is powerfully aided by the testimony of the general yardmaster, Swearingen, (R. 287-288) as follows, to wit:

"A. I will say to you that there was no spike pulled from that plate while we were making that test, not up until this time. Later on they pulled the spikes from that plate, lined the switch over there and drug the plate with it.

"A. You say lined the switch over there, you mean they ran through the switch wrong? A. No, you are asking about the plate?

"Q. Yes, sir. A. All right, the spikes now, you understand, were pulled out of this plate here. When we went through there, instead of throwing the ball over it just pulled the whole thing, this part of this, over to the west.

"Q. Then did you go through the switch with the switch set right and with the spikes out? A. Yes."

This testimony was brought out on direct examination of the witness by the defendant, who stopped *right there*. This testimony absolutely destroys the theory that the east wheel exerted pressure against the east switch point and thereby prevented the ball and lever from being thrown to the west, because the whole assembly actually was pulled to the west according to Swearingen and if it would pull the assembly west when it was not spiked down, such fact is evidence that there was no pressure against the east switch point by the flange of the east wheel, otherwise, the plate, lever and ball could not have been dragged west, but would have had pressure exerted against them toward the east.

However, this is not the only hypothesis that suggests itself as to how the accident could have happened, because even if neither of the switch points did not become depressed from time to time below the level of the adjacent rail against which they lay, they could have been moved to

the west by the tender passing over them. The evidence shows that while the standard gauge of a track is 4 feet 8½ inches, yet the gauge of the switch points was 5½ inches less than the gauge of the track, and this would be true regardless of the gauge of the track, because the throw of the lever was 5½ inches and without considering the looseness of the connection, the gauge of the points would have to be 5½ inches less than the gauge of the track because they move and play for a distance of 5½ inches within the gauge of the track and as the flange of the wheel was 1½ inches thick, then even with the flange of the wheel between the west rail and the west switch point, the switch points could still be moved back and forth for a distance of 4 inches between the rail and the flange of the west wheel at any point opposite the place where the distance was shortest between the west switch point and the west rail. The evidence of defendant's witnesses shows there was 1½ inches of play in the lever before it would move the switch point (R. 206) (whether the witness meant that the lever would have to be raised 1½ inches without moving the switch points or that the switch points could be moved 1½ inches without moving the lever is not clear) and assuming that the witness meant the points could be moved 1½ inches without the lever being moved (which is taking the view most unfavorable to respondent), this would leave 2½ inches that the switch points could be moved to the west, exerting pressure in that direction against the lever, and pull through the connecting rod before it would strike the flange on the west wheel. This is half the throw distance of the lever and would raise the lever and ball at least 90° or to a perpendicular position and the momentum with the weight of the tender on the switch points would be sufficient to cause the lever and ball to move clear over and strike decedent. It will, therefore, be seen that even if the east switch point was higher than the ad-

jacent east rail with the weight of the tender upon it, nothing to hold the lever down and the tender being inclined to move from side to side, there would be a tendency to pull the switch point to the west and consequently the lever and ball and this would be accentuated if the connecting rod were bent because that would shorten it and tend to eliminate the $1\frac{1}{2}$ inches of play in the lever, before it would start to move the points and throw it over toward the west before the point would stop against the flange of the west wheel.

Another theory could account for the movement of the switch points and ball. The court will take judicial notice that the gauge of the wheels is the same as the track namely 4 feet $8\frac{1}{2}$ inches from inside to inside of flange. The evidence showed that the tread of the wheels was $4\frac{1}{2}$ inches. Therefore the distance from outside tread to outside tread of any opposite wheels would be 5 feet $5\frac{1}{2}$ inches (4 feet $8\frac{1}{2}$ inches plus $4\frac{1}{2}$ inches for each wheel) and allowing 1 inch on each wheel for sufficient bearing surface upon the rail, or 2 inches altogether, there would be 7 inches that the track could be out of gauge and the wheels still remain thereon and 7 inches in which the wheels could play back and forth between the rails. Toner testified that there was quite a bit of motion to switch engines on industrial tracks which is probably caused by the play of the wheels back and forth between the rails and on the rails (R. 158, 159). There are two pairs of trucks under a tank or tender or four wheels on each side (R. 58). If, therefore, there was lateral motion of the tender, it was caused by the wheels moving from side to side between and on the rails on account of the track being out of gauge and if it was off gauge, then the rear wheel on the west side of the truck might hit the heel of the west switch point, as it was higher than the adjacent rail, and cause the front

wheel on the east side of the truck to pull toward the west and pull the east point, ball and lever with it. In fact, this is what decedent testified did happen (R. 64).

Other probabilities might suggest themselves to the learned court and in this connection it might not be amiss to call to the court's attention some other factors. For instance, all of the evidence showed that the sole purpose in having the ball upon the lever was to prevent its raising up. If, then, that was its sole purpose, in what position should it be for the ball to accomplish this purpose? Certainly, not when it would be laying to the west because all of the testimony showed that by running through the switch the ball would raise up and go over, and if, as suggested by counsel in its brief, and followed by the learned Commissioner in his opinion, the pressure of the flange of the wheel against the rail would prevent the lever and the ball from being pulled over to the west, then the ball accomplished no purpose at all, and was a useless instrumentality. But the testimony also showed that the purpose of the ball was to counteract the weight of the engine and cars. That must mean to counteract their weight when they were on a switch point because it was not the weight of the engine or cars which moved the lever to the east when the switch was run through, but the position of the flange of the west wheel between the west switch point and the west rail. Therefore, the purpose of the ball was to prevent the movement of the point and the lever when an engine or car was passing over the switch and not when running "through" it and such function was thereby recognized by the defendant—that cars and engines on a switch point had a tendency to cause the same to move. Further, the evidence showed the connecting rod was bent. This would naturally shorten it and if it had previously been tight and in first class condition, the bending and shortening would prevent the ball from

going clear down and resting on the head block when the points would be toward the east and as shown by plaintiff's exhibit 2 (R. 26-27). When the ball is resting on the head block to the east, it is past dead center, and any pull exerted to the west would merely pull it down tighter against the head block, whereas, if the connecting rod was so shortened and bent that the east switch point touched the east rail before the lever was thrown past dead center, then there would be nothing interposed between the lever and its movement up and to the west. Also, by reference to exhibit 2 (R. 26, 27) and K (R. 194, 195) it will be seen that each track is braced at every tie opposite the switch points, which would hold it rigid against any pressure from a wheel against the channel or west side of the east rail, whereas, the switch point was loose and only connected to the other switch point and at its north end with an adjacent rail (loosely). This is what Freeze referred to in his testimony (R. 183) when he said that the switch points were supposed to be higher than the adjacent rail otherwise the pressure of the wheel would catch the rail and turn it over.

Petitioner, therefore, does not see anything so improbable, impossible, extraordinary, uncommon or contrary to physical facts as to be unbelievable or rather so unbelievable as to render decedent's testimony and that of the other witnesses in the case unbelievable and thereby prevent the application of the *res ipsa loquitur* doctrine to the facts proven.

The opinion of the Supreme Court of Missouri states (R. 337):

"If the switch was improperly lined for a south movement on the Brockett spur then a movement of the engine south through the switch would have had a tendency to throw the ball and lever from west to east. If that happened the occurrence was not due to a mechan-

ical defect, but to some negligence on part of the crew in "running a switch," which we understand in railroad parlance means, going through a switch not properly aligned for the movement made."

182 S. W. 2d 61, l. c. 63 as follows to-wit.

By this statement the court conceded therewith sufficient evidence to go to the jury upon the question of the engine crew "running through the switch" and this negligence is accentuated by the evidence of the defendant of rule No. 1188 as follows, to-wit:

"When approaching switches the enginemen must know that they are in proper position (R. 235)."

This rule prohibits running through a switch, permits of no exception, and enginemen are penalized when it is violated (R. 274). The enginemen were not penalized in this case (R. 275) and in view of section 1 of the Federal Accident Reports Act, 36 Statutes 350, Section 38, Title 45, Chapter 1, 1935 Addition, Code of Laws of the United States it is the duty of the executive officer of every common carrier engaged in Interstate Commerce to make a monthly report of all accidents resulting in injuries to persons and a penalty is prescribed for their failure so to do. It will therefore, be presumed that the respondent obeyed the law and that a thorough investigation was made for the purpose of ascertaining the cause of this disaster and respondent undoubtedly knows that the switch had not been "run through" otherwise the enginemen would have been penalized. In fact, the evidence is conclusive that they did make an investigation and made tests of this very switch subsequent to Dever's injury.

However if the engineman had run through the switch in violation of the rule and Dever been injured as a result thereof then there is no doubt that the action of the trial

court in granting a new trial was proper, even though there was no evidence to sustain a judgment under the *res ipsa loquitur* doctrine because the practice in the courts of Missouri in such a case is as set forth in the case of *Smith v. Terminal Railroad Association of St. Louis*, 160 S. W. 2d 476 (not reported in the state reports) l. c. 479 as follows to-wit:

“The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and *even though the plaintiff fails to substantiate the theory upon which his case was tried*, if he nevertheless shows a state of facts which *might* entitle him to recover if his case were brought upon a proper theory the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which his evidence discloses. *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *Woodson v. Metropolitan Street R. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A. N. S., 931, 20 Ann. Cas. 1039; *Chandler v. Chicago & A. R. Co.*, 251 Mo. 592, 158 S. W. 35; *Patzman v. Howey*, 340 Mo. 11, 100 S. W. 2d 851; *Scott v. Davis*, 216 Mo. App. 530, 270 S. W. 433; *Anderson v. Wells*, 220 Mo. App. 19, 273 S. W. 233; *Neeper v. Heinbach*, Mo. App., 249 S. W. 440.” (Emphasis ours.)

In view of this state of the law the action of the Supreme Court of Missouri in denying a new trial to plaintiff is not understandable.

Conclusion

It is respectfully submitted that the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 784.

CARLTON R. BENTON, ADMINISTRATOR OF THE
ESTATE OF WILLIAM L. DEVER, DECEASED,
PETITIONER,

VS.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.

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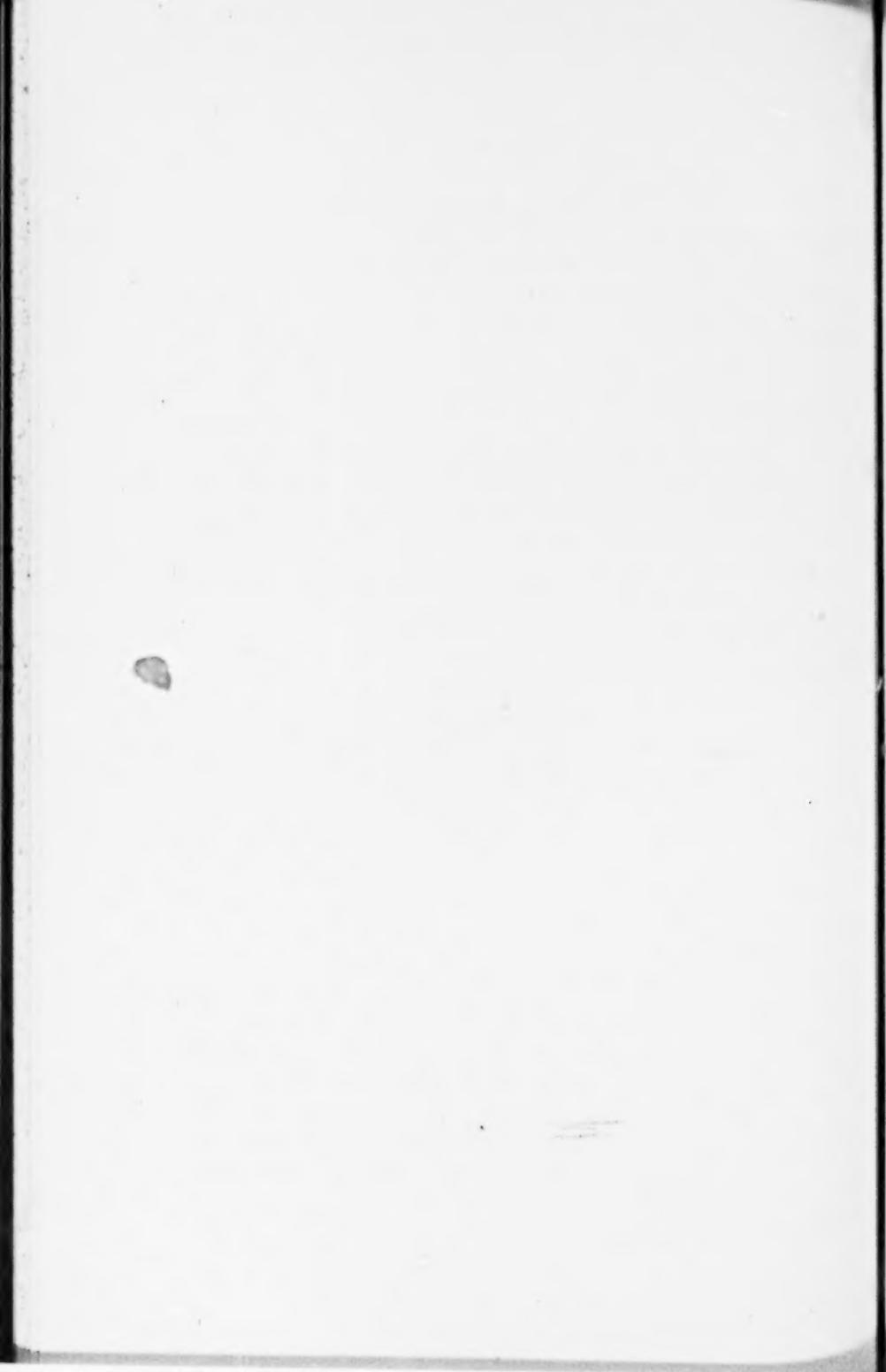


INDEX

Statement	1
Points of Fact and of Law and Grounds Urged in Argument in Opposition to Petition for Writ of Certiorari	8
Argument—	
I. The petition should be denied because petitioner failed to comply with Rule 38 of this court	10
II. When plaintiff's evidence in an action under the Federal Employers' Liability Act fails to establish actionable negligence defendant is entitled to an instructed verdict	11
III. Oral testimony in conflict with conceded physical facts has no probative value and creates no inference of negligence	13
Conclusion	30

TABLE OF CASES

Atchison, T. & S. F. Ry. Co. vs. Toops, 281 U. S. 351, 50 S. Ct. 281	9, 25
Brady vs. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232	8, 11
Carter vs. Kurn, 127 F. 2d 415	9, 27
Galloway vs. United States, 319 U. S. 372, 63 S. Ct. 1077	8, 9, 12, 25, 27
Galloway vs. U. S., 130 F. 2d 467	9, 12, 25, 26
Jacobson vs. Chicago, M., St. P. & P. R. Co., 66 F. 2d 688	9, 26
New Orleans & N. E. R. Co. vs. Harris, 247 U. S. 67, 38 S. Ct. 535	8
Pennsylvania R. Co. vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391	8, 9, 27
Roseman vs. United Rys. Co., 251 S. W. 104	9, 29
Stelte vs. Larkin, 110 F. 2d 226	9, 27



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STATEMENT.

Due to the fact that petitioner's statement of the case is not direct and concise and does not fairly present the facts under which the Supreme Court of Missouri found that plaintiff's evidence was so contrary as to physical facts as to be unbelievable, and not sufficient to support a verdict for the plaintiff, and therefore should

be disregarded, counsel for respondent desire to call the court's attention to the following facts.

In the petition under which the cause was tried, it was alleged by plaintiff as follows:

"That the instrumentalities used in connection with such tracks were two switch points connected by what is known as a bridle rod in such manner that said switch points could be simultaneously moved in an easterly and westerly direction and a constant distance at the same time maintained between them, and that said bridle rod and said switch points, in turn, were attached to a connecting rod extending therefrom in an easterly direction from said switch tracks to a switch stand throw lever, to which it was connected at a point several inches from where said switch stand throw lever was attached to a fixed fulcrum, being a metal plate fastened to two cross-ties or head blocks extending westwardly from said switch stand to and under said switch points and the rails of said switch tracks adjacent thereto, and approximately eighteen inches west of the west track thereof, the opposite end of said switch throw lever being free and having a large metal ball thereon, said connecting rod being attached to said lever in such a manner that when said free end of said switch throw lever was swung, thrown, or moved toward said switch tracks and said switch points, said points would move to the west and permit cars to be moved freely from said Brockett spur switch track on to the tracks of said Drake's spur, and when said switch stand throw lever was swung, thrown or moved away from said switch tracks said switch points would move toward the east and permit the movement of cars freely back and forth over said Brockett spur switch track and switch points, without interference by said Drake's spur track."

Plaintiff further alleged that he was unable to determine the cause of his injury and had no knowledge or means of knowing the cause or causes which operated to bring about the unusual and extraordinary movement of the switch throw lever from the east to the west which he claimed caused his injury. He alleged that as the engine upon which he was riding approached the switch the throw lever was in its proper place and position, and lying flat upon the cross-ties and away from the rails of the track, and that when the wheels of the tender of the engine passed over the rails and switch points in close proximity and immediately adjacent to the switch stand and as a direct result of the dangerous and defective "instrumentalities" described in the petition and the negligence and carelessness of the defendant the "throw lever of the switch was caused to violently move, swing, wave, flop, fly up and be thrown in plaintiff's direction suddenly and in an unexpected, abnormal, unexplainable, unusual and extraordinary manner and without the intervention of any human agency" (R. 7-8). Plaintiff had been familiar with the switch where he was injured for 18 years prior to the accident (R. 21).

At the trial of the cause plaintiff testified in detail as to the method of construction and operation of the switch involved, and his testimony closely followed the allegations in the petition above set forth as to method of construction and manner of operation (R. 22, 30, 33, 34, 35, 36, 39, 40, 46, 53, 54, 60, 61, 62, 65, 73). He personally had constructed a model of the track, switch, switch lever and all of the equipment and same was offered in evidence as plaintiff's Exhibit 3 at the trial of the cause. This exhibit and a working model of the switch offered in evidence by defendant as a part of the cross-examination of the plaintiff were before the

Supreme Court of Missouri at the time the cause was argued and submitted to that court under the following stipulation and agreement of the parties:

"At the trial of the cause there was offered in evidence by both appellant and respondent working models of the railroad switch involved in this controversy. Due to the fact that it was and is impossible to reproduce said models in the abstract of the record in such a way or manner as the mechanics thereof could be fully explained and understood, it is agreed by the parties that the originals of said models will be produced in court at the oral argument of this cause and that the same may be considered a part of the record in this cause by the Supreme Court of Missouri and considered by the court in arriving at a decision in this cause."

Plaintiff testified that for 18 years he had passed over the switch every few days, was thoroughly familiar with the manner in which the switch was constructed, with the condition of the track leading up to the switch, with the condition of the switch and switch points and with the manner in which the switch operated (R. 54). As the engine upon which he was riding approached the switch he observed the points were properly aligned for the movement being made, in other words, for a movement of the engine and car toward the south end down the Brockett spur and with the west switch point away from the west rail and with the east switch point against the east rail (R. 29-31). His testimony was positive that due to the manner in which the switch was constructed the switch lever and ball necessarily moved in the same direction as the switch points and that if the switch points were to the east and properly set for the movement being made the ball would necessarily lie to the west and away from the track.

Upon direct examination he testified as an expert having 17 years experience it would have been impossible, in the event the switch was improperly set for the movement and the engine had "run through" the switch, for the ball to have been thrown toward the engine or toward the track; that if the switch had been set wrong for the movement, and with the points toward the west, and the engine had "run through" it, something would have had to have given and the switch points would have been thrown by the weight of the engine toward the east and that such movement of the points would have caused the lever and ball to move from the west to the east (R. 56).

He testified that after the accident the switch plate was pulled up at an angle of possibly 45 degrees and that the spikes which held the plate to the head block were sticking up (R. 33), but there was no evidence that such condition existed before the accident. The plaintiff testified that if the east wheels of the engine were on the east switch point and the west wheels on the west rail it would not be possible for the switch lever and ball to move toward the west unless the switch plate was defective and the switch points open (R. 74). There was no evidence that the switch plate at the time was defective and the plaintiff positively testified on several occasions during his testimony that the switch points were not open but were properly aligned and set for the movement which was being made (R. 22, 29, 31, 41, 55). Plaintiff further testified that if the switch points had not been properly aligned for the movement and the engine had "run through" the switch it would have been *impossible* for the ball to have been thrown toward the track or toward the west, and that it was *bound* to go to the east in that movement. His testimony was that the switch was on a curve, and in going around the

curve the weight of the engine would be thrown toward the left or east rail and point, and would exert pressure toward the east on the east point, and the flange of the wheels would crowd the east rail and point (R. 47).

Plaintiff offered in evidence the photograph which is attached to the opinion of the Supreme Court of Missouri (R. 336a). Respondent contended in the Supreme Court of Missouri that under plaintiff's own evidence in the case, under all the evidence in the case, and by reason of the facts disclosed by the various exhibits and the working models introduced in evidence by both plaintiff and defendant, plaintiff's testimony that the switch lever and ball moved from east to west was without any probative effect and was not entitled to credence because it contravened all laws of mechanics, was contrary to the known and admitted physical facts in the case, the known laws of mechanics, and inherently impossible.

A number of inaccurate statements appear in relator's statement of the case and in his argument in support of his petition for writ of certiorari. On pages 18 and 21 of relator's statement of the case reference is made to the fact that Dever testified that after the accident the spikes in the plate which held the switch plate to the head block were sticking up and the plate was raised to about a 45 degree angle.

On page 21 of the statement of the case it is recited that Dever had not noticed that the two spikes on the east end of the plate were up about 3 inches before the accident. There was no evidence whatsoever in the case to the effect that these two spikes were pulled before the accident and no evidence that the plate was in any wise loose or defective prior thereto. Dever testified that a movement of an engine over the switch could not have possibly caused any movement of the switch

lever from the east toward the west unless the switch plate was defective and the switch points open (R. 74). His positive evidence was that the switch points were not open but were properly aligned and set for the movement being made.

On page 23 of the statement of the case relator says that the wheels of locomotives, switch engines, and tenders become worn from constant use and flanges made thin. However, there was no evidence of any such condition in the locomotive and tender involved.

On page 31 of relator's statement of the case and on pages 39, 40 and 44 of the argument relator misquotes the testimony of respondent's witness Swearingen, and says that Swearingen testified that in making a test of the switch following the accident all of the spikes were pulled from the plate, the switch was set for proper movement over it and that when the engine passed through the switch the whole thing was pulled over to the west.

On page 44 of the argument relator quotes a portion of Swearingen's testimony but omits statements appearing on pages 286, 287 and 288 of the record which conclusively show that Swearingen testified directly opposite to what relator says he testified. Swearingen definitely testified that when the spikes were removed from the plate and the switch properly set for a southerly movement over it nothing happened when the engine passed through the switch, and the ball and lever were not thrown from the east to the west, and that such a thing could not have happened due to the manner in which the switch was constructed (R. 286, 287, 288).

**POINTS OF FACT AND OF LAW AND GROUNDS
URGED IN ARGUMENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

I. The writ should be denied for the reason that petitioner failed to serve on counsel for respondent a notice of the filing of the petition together with a copy of the petition, printed record and supporting brief within ten days after the filing thereof in this court in violation of the terms and provisions of Section 3, Rule 38 of this court.

II. The writ should be denied for the reason that neither petitioner's petition for writ of certiorari, nor the supporting brief are direct and concise and contain no direct, accurate or concise statement of fact in violation of Section 2, Rule 38 of this court.

III. In an action under the Federal Employers' Liability Act, an employee to be entitled to recover for injuries from his employer has the burden of establishing actionable negligence, either by direct proof or by reasonable inference, and when plaintiff's evidence in such a case fails to establish such negligence he is not entitled to recover and an instructed verdict should be given for the defendant.

Brady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232.

New Orleans & N. E. R. Co. v. Harris, 247 U. S. 67, 38 S. Ct. 535.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391.

Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077.

IV. The testimony of the plaintiff Dever to the effect that the switch lever and ball was thrown from the east to the west, when the engine and tender were upon the switch points, being so contrary to physical facts as to be unbelievable could not be the basis of an inference of negligence, and Dever failed to prove actionable negligence. The Supreme Court of Missouri therefore properly ruled and held that he had failed to establish actionable negligence, and was not entitled to recover.

Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281.

Jacobson v. Chicago, M., St. P. & P. R. Co., 66 F. 2d 688.

Galloway v. U. S., 130 F. 2d 467.

Galloway v. U. S., 319 U. S. 372, 63 S. Ct. 1077.

Carter v. Kurn, 127 F. 2d 415.

Stolte v. Larkin, 110 F. 2d 226.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391.

Roseman v. United Rys. Co., 251 S. W. 104.

ARGUMENT.**I.**

The petition should be denied because petitioner failed to comply with Rule 38 of this court.

Petitioner in violation of Section 3, Rule 38 of this court failed to serve on counsel for respondent a notice of the filing of the petition together with copy thereof, printed record and supporting brief within ten days after the filing thereof in this court, and has failed to include a direct and concise statement of the facts involved, either in his petition for certiorari or brief in support thereof, all in violation of Rule 38 of this court.

Section 2 of the revised Rule 38 of this court, adopted February 13, 1939, effective February 27, 1939, provides that a petition for certiorari shall contain a summary and short statement of the matter involved and that the supporting brief must be direct and concise. Neither the statement of fact contained in the petition, nor the statement contained in the supporting brief, comply with the provisions of paragraph 2 of said Rule 38 in that such statements are not direct, concise or accurate.

Furthermore, the petition for writ of certiorari in this cause was filed in this court on the 26th day of December, 1944. The ten day period for service of notice upon counsel for respondent, as provided for under Section 3, Rule 38, expired on January 5, 1945. Neither a notice of the filing of the petition for writ of certiorari, nor printed copies of the record and petition for writ of certiorari were served upon counsel for respondent until January 12, 1945. Section 3 of Rule 38 provides that notice of the filing of the petition together with a copy of

the petition, printed record and brief "shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof when court is not in session) and due proof of service shall be filed with the clerk." Proof of service filed with the clerk in this cause shows that service was not had on counsel for respondent until January 12, 1945. So far as counsel for the respondent is informed, time for service was not enlarged by the court, and, if no order enlarging the time has been entered, the failure to give the notice within the prescribed time was a clear violation of Rule 38 and for that reason the petition should be denied.

II.

When plaintiff's evidence in an action under the Federal Employers' Liability Act fails to establish actionable negligence defendant is entitled to an instructed verdict.

In the recent case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, this court reiterated the doctrine that where plaintiff's evidence in an action under the Federal Employers' Liability Act fails to establish actionable negligence the defendant is entitled to a directed verdict. In that case this court said:

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

In the same opinion this court said relative to liability under the Act:

"Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury."

In the case of *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077, it was held that the granting of a defendant's motion for a directed verdict, where plaintiff's evidence was legally insufficient to sustain a verdict in his favor, was not erroneous, and did not in effect deprive the plaintiff of a trial by jury contrary to the 7th Amendment. In reference to the effect of the 7th Amendment this court in that case said:

"If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

In discussing the standards of proof required for submission of a case to the jury, this court, in its opinion in that case, recognized the matter was essentially one to be worked out in particular situations and for particular types of cases, and in that connection said:

"Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence, or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the Amendment requires to be followed."

In that case, this court affirmed the opinion and judgment of the United States Circuit Court of Appeals for the 9th Circuit in *Galloway v. United States*, 130 F. 2d 467,

and wherein it was ruled and held that evidence contrary to physical facts was without probative force and effect and insufficient to require a submission to the jury and that under such circumstances the giving of a directed verdict for a defendant was proper.

III.

Oral testimony in conflict with conceded physical facts has no probative value, and creates no inference of negligence.

In the case at bar plaintiff's cause of action was solely bottomed upon the contention that at the time the tender, upon which he was riding, approached and reached the switch and switch stand, the switch points were in proper position for the movement being made, with the switch lever and ball lying to the east and away from the track, and that as the tender reached the switch stand the lever and ball suddenly moved from the east toward the west and struck him while he was still upon the foot board of the tender.

He did not proceed upon any theory of negligence on the part of any member of the crew and cannot now be heard to say that he possibly made a case of submissible negligence on the theory that the switch was not properly set for the movement being made, and that the engine crew negligently "ran through" the switch. This is positively contrary to his own testimony, to the allegations contained in his petition and to the theory upon which he tried his law suit. He is as much bound by his trial theory in this court as he was in the Supreme Court of Missouri and in the trial court. It needs no citation of authority to sustain the rule that a plaintiff is bound by the same theory as to liability in this court as he adopted in the lower court.

It was the contention of the respondent in the trial court, and in the Supreme Court of Missouri, that plaintiff's testimony that the switch lever and ball moved from the east to the west, should, under plaintiff's own evidence in the case, his exhibits and the working models admitted in evidence, have been rejected and disregarded for the reason that it contravened all laws of mechanics, and was contrary to the known and admitted facts in the case, and the known laws of physics, and inherently impossible. The jury in the trial court returned a verdict for the defendant from which it may be inferred that the jury rejected plaintiff's oral testimony as being unworthy of belief because it was contrary to physical facts.

The Supreme Court of Missouri, upon a review of the whole record in the case, and having before it the photographs offered in evidence by the plaintiff, plaintiff's testimony as to method of construction of the switch, the working model offered in evidence by the plaintiff, and the working model offered in evidence by defendant, concluded, and properly so, that plaintiff's testimony to the effect that the switch lever was thrown from the east to the west was so contrary to physical facts as to be unbelievable and that such evidence would not support a verdict for the plaintiff, and should be disregarded.

There was no evidence of specific negligence.

While plaintiff testified that some of the working parts of the mechanism of the switch were loose and that the track were not in the same condition that a main line track would be in, he testified in the case that he had no exact knowledge of the reason for the alleged movement of the lever from the east to the west. He testified (R. 43) as follows:

"Q. Do you have any exact knowledge of the causes which operated to bring about the throwing of this

lever over towards you?
A. No, sir."

There was no evidence that the loose condition of the parts of the switch caused plaintiff's alleged injury.

In his petition, he alleged that the movement of the lever from east to west was unexplainable and without the intervention of any human agency (R. 9), and that he had no knowledge or means of knowing the cause or causes which operated to bring about the alleged unusual and extraordinary movement of the lever (R. 6). Unless negligence may be inferred from plaintiff's oral statement that the lever moved from east to west, then there was no evidence of negligence which proximately caused plaintiff's alleged injury.

Was plaintiff entitled to an inference of negligence under all of the admitted facts and circumstances in the record and under the physical facts? The Supreme Court of Missouri correctly answered this question in the negative. The manner in which the switch was constructed, the way and manner in which the switch lever was connected with the switch points, and in which it operated was definitely described and set forth in plaintiff's petition. At the trial of the cause he testified with definiteness and certainty as to the manner in which it operated.

Prior to the trial of the cause he had constructed a working model of the switch which was introduced in evidence as plaintiff's Exhibit 3. The defendant also offered in evidence a working model of the switch. Both of these models were before the Supreme Court of Missouri under an agreement of parties that the same might be considered as a part of the record in the cause and considered by the court in arriving at a decision. There was no dispute at the trial as to the way and manner in which the switch was constructed. The two switch points were connected with

each other and with the switch lever so if the switch ball was moved from the east to the west the switch points necessarily had to move in the same direction. It was likewise undisputed that the construction of the switch was such that if the switch points were moved from the west to the east the switch lever and ball necessarily both moved in the same direction and could move in no other direction. The plaintiff's own testimony, his working model and that of the defendant clearly established the correctness of the foregoing position.

The plaintiff testified that the points and lever always moved in the same direction (R. 22). The switch and tracks in question are shown in plaintiff's exhibit 7, which is attached to the opinion of the Supreme Court of Missouri (R. 163, 336a). Said exhibit was made from a point south of the switch in question looking toward the north. The track on the right side of the picture upon which the box car is standing was the track known and referred to in evidence as the Drake spur. The track just to the left was known and referred to as the Brockett spur and extended on to the south of the switch in question.

The engine involved in the movement being made at the time of plaintiff's alleged injury was being moved south over the Brockett spur. The intention was to proceed south over the Brockett spur until the car which was attached to the front end of the engine had cleared the Drake spur switch point, as shown in the center of the picture, and then to move in a northerly direction onto the Drake spur and to spot the car on that spur near the place where the car is shown in the picture.

In a southerly movement over the Brockett spur, the tender and engine would be upon the rails of the Brockett spur until they reached the switch. The west wheels of the engine and tender would then follow the west rail of the Brockett spur track and the east wheels

would follow the east rail. When the wheels on the left or east side of the tender reached the easterly switch point they would follow that switch point to the place where it was connected with the solid rail, shown on the east or right side of the picture, which constituted the east rail of the Drake spur, to the south end of the switch point and which thereafter became the east rail of the Brockett spur.

Plaintiff testified that as the tender approached the switch points he could see that said points were properly aligned for the movement, that is a movement down past the switch on the Brockett spur (R. 41). He testified that a proper position for a southerly movement through the switch, over the Brockett spur track, required that the points should be to the east (R. 22-29-31). In plaintiff's exhibit No. 7 the points are in such position. Plaintiff further testified that he saw the opening between the west rail and the west switch points and that the track and switch points were properly aligned for the movement (R. 55). As the tender moved toward the south, the wheels on the east side, after they reached the north end of the east switch point, necessarily had to travel along said switch point and the wheels on the west side of the tender necessarily had to travel along and upon the west rail of the Brockett spur. The flanges of the wheels on the east side of the tender were to the west of and thrown against the east switch point (R. 47). The flange on the wheels on the west side of the tender, if the west switch points were open and properly aligned for the movement, as plaintiff stated they were, would be to the east of the west rail of the Brocket spur and pass between that rail and the west switch point. The first set of wheels on the tender were about 18 to 20 inches to the north of the foot board, as the tender pro-

ceeded in a southerly direction, and the second wheels 3 1/2 feet to the north of the first wheels (R. 59).

Plaintiff testified that in going around a curve, like the one at the switch involved, the flanges of the left or east wheels of the engine or tender would be thrown against the left or the east rail or switch point (R. 47), and when the wheels touched the point where they would necessarily exert pressure against it in an easterly direction. The plaintiff testified that had the switch not been properly aligned for the movement and had the west switch point been against the west rail and the east switch point away from the east rail and the switch had thus been "run through," the ball was bound to go to the east, and that under such circumstances it would have been impossible for the ball to have been thrown toward the engine, or in a westerly direction toward the track. Of course, this statement was true for the reason that if the east switch point was away from the east rail the tremendous pressure asserted against it by the wheels of the tender and the engine could not push it in any direction except to the east.

If the switch points were in the position which plaintiff testified they were, as the tender approached the switch, then the switch lever and ball could not have possibly been thrown from the east to the west as plaintiff testified it was. Such a movement of the ball was contrary to the known laws of physics and was inherently impossible. If the west wheels of the tender were upon the west rail, and the east switch point was to the west of the east rail and not against said rail, the east wheels of the tender and engine would exert pressure from the west to the east. If the switch points were properly adjusted for the movement being made, as plaintiff said they were, then as the tender entered and started to pass through the switch the west wheels would

be upon the west rail of the Brockett spur and the east wheels upon the east switch point and the flange of the wheels would be against and to the west of this east switch point and asserting pressure from west to east thereon. Of course, the gauge of the wheels is necessarily the same as that of the track. Plaintiff testified that the standard gauge was 4 feet 8 1/2 inches (R. 73).

The switch points and the switch lever were so connected that the lever could not move unless the points moved. As the engine went through the switch no force could be asserted against the rail of the track or the switch points except the force asserted through the wheels of the engine and tender. One switch point could not move unless the other moved and the switch lever and ball could not move from the east toward the west unless both switch points moved in that direction.

Under the known laws of physics it was utterly impossible, due to the manner in which the switch was constructed, for the switch points to move from east to the west as the tender passed in a southerly direction through the switch.

This, for the reason that pressure was asserted by the wheels of the tender on the east switch point in an easterly direction. No part of the ball or flat surface of the wheel could possibly touch the west switch point, because, if the switch point was open, and properly aligned for the contemplated movement, it was pulled away from the west rail a distance of several inches. The flat part or ball of the wheel was upon the west rail and the flange of the wheel would pass between the rail and the switch point and to the west of the point. No possible force could thus have been asserted upon the switch point to pull it in a westerly direction. Even though the flange came in contact with

the west switch point the force exerted would be from the west to the east and not from the east to the west. The situation was such that constant pressure from west to east was being applied to the east switch point if it was against the east rail and properly aligned for the movement, as plaintiff testified it was. Such being the case, there was no possible way in which the switch ball or lever could have moved from the east to the west as plaintiff testified it did.

Plaintiff's testimony was so contrary to the conceded physical facts as to be inherently impossible, and should therefore be rejected and disregarded, and plaintiff was not entitled to an inference of negligence.

In the case at bar, the oral statements of plaintiff to the effect that the switch lever suddenly flew from the east toward the west, when the trucks of the tender were upon the east switch point, must be viewed in the light of all the surrounding facts and circumstances. The physical facts, as established by plaintiff's own testimony, concerning the manner of the construction and operation of the switch, his own working model, and the photographs introduced in evidence by him absolutely negatived and destroyed the force of his oral statements that the switch lever and ball suddenly moved from the east toward the west, and such statements do not amount to any substantial evidence of the alleged facts to which they relate.

If the west wheels of the tender were upon the west rail of the Brockett spur as the tender entered the north end of the switch, and plaintiff and all other witnesses said they were, then the east wheels of the tender were riding upon the east switch point of the switch. The only possible pressure which could be asserted thereon would be the pressure of the east wheels of the tender and that pressure would be from the west toward the

east. There was no possible way for the switch point to move from the east to the west, and without such movement of the point the switch lever and ball could not move from the east to the west.

Plaintiff testified that the switch lever and ball moved from the east to the west just as the foot board upon which he claims to have been standing was directly opposite the lever. He further testified that the first set of wheels on the tender were 18 to 20 inches to the north of the foot board (R. 59), and that the second set of wheels were 3 1/2 feet to the north or rear of the first wheels (R. 59); that when the wheels reached the points they would necessarily exert pressure; that the switch points were 8 feet long (R. 57).

It will thus be seen that when the foot board was even with the switch lever, two wheels of the tank were riding upon the east point and asserted pressure in an easterly direction thereon. The flange of these left wheels were thus thrown against the left or east rail or switch point (R. 47). The plaintiff's statement that the switch throw lever flew from the west to the east was absolutely negatived by his own oral testimony. We quote from page 74 of the abstract:

"Q. I want you to tell the jury whether if the wheels are on the east switch point and on the west rail of that track, if it would be possible for that ball to flop over toward the west?

A. Not unless the switch plate was defective, *and the switch points open*" (Italics ours).

There was no evidence that the switch plate at the time was defective and plaintiff positively testified on several occasions during his testimony that the switch points were not open but were properly aligned and set for the movement which was being made (R. 55, 41, 22,

29-31). Furthermore, plaintiff testified that if the switch had been improperly set for the movement being made and the engine and tender had "run through" the switch the effect would have been to throw the switch lever and ball from the west toward the east. This statement was true, due to the manner in which the switch was constructed. Under such circumstances, the flange on the west wheels of the tender would necessarily have to pass between the west switch point and the west rail, the face or ball of the wheel being upon the west rail, and the flange on the west side thereof. This would have exerted a pressure from the west toward the east against the west switch point. Under such circumstances the east wheels of the tender would have been upon the east switch point with the ball of the wheel upon the point and the flange to the west of the point. The pressure necessarily exerted would have been from the west toward the east. Plaintiff testified that under such circumstances it would have been *impossible* for the ball to have been thrown toward the track or toward the west (R. 30). He testified (R. 30):

"Q. I want you to tell the jury what happens when you run through one of these switches that is operated by a ground throw ball, tell what happens to the ball?

A. If the ball goes in any direction at all it goes away from the track, *bound to go to the east in that movement.*

Q. I want you to tell the jury, as a switchman of seventeen years experience, if it would be possible, if you run through that switch, for that ball to have been thrown toward the engine or toward the track?

A. *No, sir, impossible.*"

Of course, it was impossible, for the reason that the pressure exerted on the switch points was from the

west toward the east. For the same reason it was impossible for the lever and ball to move or be thrown from the east toward the west, if the switch was properly aligned for the movement as plaintiff testified it was. The same laws of physics which apply to one situation apply with like force and effect to the other. In one case the ball could not move from the east to the west, and would be thrown from the west to the east by reason of the tremendous pressure being asserted against the switch points by the wheels of the engine and tender. Having once been thrown from the west to the east, it could not again move from the east to the west as long as the wheels were upon the point for the reason that the pressure was necessarily continuous. Plaintiff testified as follows (R. 56):

"Q. And if that switch point was thrown toward the east it would necessarily carry with it an eastern movement of this ball like that, wouldn't it?
A. Yes, sir."

He further testified (R. 59):

"Q. And those wheels as they touched this point, would necessarily exert pressure on the point, wouldn't they.
A. Yes, sir.

Q. And would have a tendency to force the point over toward the east?
A. That point was already to the east."

He further testified (R. 47):

"Q. If you are going around here in an engine like this, around a curve like this, isn't the weight of the engine thrown toward the left rail, if you are going in this direction?
A. Yes, sir, this flange will crowd this rail.

Q. Will crowd the left-hand rail?
A. Yes, sir.

Q. So that at this switch in question, this track curved toward the left, as it came around the curve the flange of the engine would be thrown toward the left or east rail, wouldn't it?

A. Yes, sir.

Q. You would be thrown against the left rail or the east rail?

A. Yes, sir."

From these statements, it will thus be seen that plaintiff's testimony that the ball moved from the east toward the west at a time when the wheels of the tender were upon the west rail of the Brockett spur and the east switch point, was directly contrary, not only to the physical facts and laws of physics as disclosed by the exhibits in the case, but contrary to plaintiff's own oral testimony. After plaintiff's injury, the engine and tank proceeded on south over the switch and came to a stop at a point where the gangway between the tank and engine was directly opposite the plaintiff (R. 32). Plaintiff fell in a little ditch a few feet south of the switch. All of the wheels of the tank therefore necessarily passed through the switch before the stop was made. The west wheels of the tank necessarily had followed the west rail of the Brockett spur, and the east wheels had necessarily followed the east switch point and at the south end thereof passed to the east rail of the Brockett spur, which, to the north of the switch point became the east rail of the Drake spur. This conclusively establishes that at all times the east switch point was in its proper position against the east rail. If the east and west wheels of the tank had not followed the course above indicated the tank would necessarily have been derailed, and the evidence was conclusive that no such thing occurred.

The fact that connections between the switch points and the switch throw lever, as testified to by the plain-

tiff, may have been loose or worn in no wise alters the situation or changes the physical laws involved. Plaintiff claims that the throw lever moved without the intervention of human agency. Under the manner in which the appliance was constructed, the only force which could move the switch lever and ball from east to west was a movement of the switch points from the east to the west. The only force which could effect a movement of the switch points from east to west was that exerted by the wheels of the tank. If the pressure was from east to west, as plaintiff testified, then looseness of connections could in no wise change the direction of pressure and plaintiff's testimony in regard to loose connections in no wise alters the situation.

The admitted physical facts in the case and plaintiff's oral testimony refuted any inference which might in the absence of such physical facts have been drawn. Plaintiff's testimony that the ball and lever moved from the east to the west, being contrary to physical facts, was not sufficient to create an inference of negligence. *Galloway v. United States*, 319 U. S. 372, 3 Sup. Ct. Rep. 1077; *Galloway v. United States*, 130 F. 2d 467. The testimony of the plaintiff that the ball moved from the east to the west, in the light of conceded physical facts, was not such evidence from which an inference could reasonably be drawn that the alleged injury suffered by the plaintiff was caused by the negligence of the respondent. Plaintiff's evidence to the effect that some of the switch connections were loose and not up to standard for a main line track was not sufficient to make a submissible case for him for the reason that there was no evidence that such condition was the cause of his injury.

In the case of *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 50 S. Ct. 281, this court declared:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

The conclusion of the Supreme Court of Missouri that oral testimony which is so contrary to physical facts as to be unbelievable is lacking of probative force is in strict accord with the rule followed by the federal courts.

In the case of *Jacobson v. Chicago, M., St. P. & P. R. Co.*, 66 F. 2d 688 (C. C. A. 8), the court declared, l. c. 693:

"This testimony is in conflict with the physical facts and scientific principle, and hence is lacking in all probative force. *United States v. Harth*, (C. C. A. 8) 61 F. 2d 541; *United States v. McGill*, (C. C. A. 8) 56 F. 2d 522; *Ed S. Michelson, Inc., v. Nebraska Tire & Rubber Co.*, (C. C. A. 8) 63 F. 2d 597; *Liggett & Myers Tobacco Co. v. DePareq*, (C. C. A. 8) 66 F. 2d 678."

The Jacobson case involved an action under the Federal Employers' Liability Act.

In *Galloway v. United States*, 130 F. 2d 467, the Circuit Court of Appeals for the Ninth Circuit said:

"It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence. *Deadrich v. United States*, 9 Cir., 74 F. 2d 619, 622. If the testimony introduced here by the plaintiff were contradicted by the

physical facts, the trial judge was bound to direct a verdict for defendant."

The judgment of the Ninth Circuit Court of Appeals in that case was affirmed by this court in *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077.

In *Carter v. Kurn*, 127 F. 2d 415 (8th Circuit), the court declared:

"Oral testimony loses its probative force when contradicted by admitted physical facts."

In *Stolte v. Larkin*, 110 F. 2d 226, the court stated:

"As a rule of law, it is true that where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make out a case for the plaintiff, the physical facts must control. No jury can be allowed to return a verdict based upon oral testimony which is flatly opposed to physical facts, the existence of which is thus established. *Elzig v. Gudwangen*, 8 Cir., 91 F. 2d 434, 440."

In the opinion of this court in the case of *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, the same rule, in effect, was applied. In the opinion in that case this court said:

"It is well settled that, where plaintiff's case is based upon an inference or inferences, the case must fail upon proof of undisputed facts inconsistent with such inferences."

In the case at bar, the undisputed facts utterly destroyed any inference of negligence which might ordinarily have been drawn from plaintiff's oral testimony that the switch lever moved from the east to the west when the weight of the engine was upon the switch points. Plaintiff's oral testimony being unbelievable, be-

cause in direct conflict with physical facts, was not sufficient upon which a verdict in his favor might have been based. In the case just cited this court further declared:

"Not only is Bainbridge's testimony considered as a whole suspicious, insubstantial, and insufficient, but his statement that when he turned shortly after hearing the crash the two strings were moving together is simply incredible, * * * At that sharp angle and from that distance, near dusk of a misty evening (as the proof shows), the practical impossibility of the witness being able to see whether the front of the nine-car string was in contact with the back of the two-car string is apparent. And, certainly, in the light of these conditions, no verdict based upon a statement so unbelievable reasonably could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see, as this witness was not, the precise relation of the cars to one another."

In that case this court approved the action of the trial court in withdrawing the case from the jury and held that the plaintiff was not entitled to the benefit of inferences, which had to be drawn from testimony contrary to physical facts, and held that a verdict under the Federal Employers' Liability Act must be based upon substantial evidence and not upon mere speculation and conjecture, and in that connection said:

"Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

The opinion and decision of the Supreme Court of Missouri, in the case at bar, is directly in line with the

decision of this court just referred to and said decision is full authority for the position taken in the Supreme Court of Missouri.

The established rule in Missouri relative to oral testimony contrary to physical facts was very aptly stated by the St. Louis Court of Appeals in the case of *Roseman v. United Railways Co. of St. Louis*, 251 S. W. 104, in the following language:

"It has been repeatedly ruled that, when the testimony of a witness upon a material issue is contrary to the physical facts, or when such testimony necessarily relied upon is inherently impossible, or the inferences deducible therefrom are so opposed to all reasonable probability as to be manifestly false, the courts are not bound to stultify themselves by giving credence to such testimony, but will wholly disregard it."

The oral testimony of the plaintiff in the case at bar was so opposed to the conceded physical facts in the case as to be manifestly false and therefore could not be the basis of an inference of negligence. Without the benefit of such an inference, plaintiff's case wholly failed, and a verdict or judgment in his favor could have been based upon nothing more than guess, speculation and conjecture. He totally failed to prove actionable negligence which directly caused his alleged injury. Under such circumstances, the Supreme Court of Missouri correctly ruled and held that he had failed to make a submissible case and that the verdict of the jury in favor of the defendant should be ordered reinstated.

In petitioner's brief filed in this court in support of his application for certiorari he devotes many pages of argument in an attempt to show how plaintiff's statement to the effect that the lever and ball moved from

the east to the west might possibly be true. However, such argument is based on nothing more than guess or speculation and ignores plaintiff's own evidence and the physical facts in the case which conclusively established that, with the weight of the engine on the east switch point and exerting a force from the west to the east thereon, neither the switch points, nor the ball and lever, could possibly have moved from the east to the west.

Conclusion.

It is therefore respectfully submitted that the verdict of the jury and the judgment of the Supreme Court of Missouri were for the right party, that under the law the Supreme Court of Missouri properly ruled and held that the plaintiff was not entitled to recover, and that such judgment and decision is in full accord with the rules and opinions of this court and of the various circuit courts of appeal, and that no rights of the plaintiff were violated by the Supreme Court of Missouri and, therefore, relator's petition for writ of certiorari should be denied.

Respectfully submitted,

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